Dominance

Contributing editors
Patrick Bock, Kenneth Reinker and David R Little

2017

GETTING THE DEAL THROUGH

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Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Argentina, Bulgaria and the Czech Republic, and a new Global overview article.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb Steen & Hamilton LLP, for their assistance with this volume. We also extend special thanks to Thomas Janssens and Thomas Wessely of Freshfields Bruckhaus Deringer, the contributing editors for the previous editions, who submitted the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE DEAL THROUGH

London
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Global overview

Patrick Bock and Alexander Waksman
Cleary Gottlieb Steen & Hamilton LLP

The rules governing an abuse of dominance are arguably the most complex component of competition and antitrust legislation. They presuppose a distinction between anticompetitive conduct and open competition on the merits that is rarely clear. And the distinction has become ever harder to draw as antitrust agencies apply novel theories of harm to rapidly changing markets, sometimes without a detailed examination of whether the conduct at issue has produced exclusionary effects.

The complexity that pervades abuse of dominance rules is made worse by procedural challenges. Companies that operate across borders face the risk of parallel investigations in different jurisdictions, which can take years to resolve and may result in inconsistent outcomes. Moreover, as a rule, companies cannot submit proposed conduct to antitrust agencies for ex ante review. In sum, the difficulty of managing compliance with abuse of dominance rules has never been greater, and the consequences of infringement are severe.

This guide aims to provide some respite. It draws on the insights of specialist counsel from a wide range of jurisdictions. These include long-established antitrust regimes, such as the US, EU and certain EU member states (and a soon to be ex-member state). It navigates the often complex rules that emerging markets such as China and India have developed, and it offers prospective guidance on nascent antitrust regimes like Hong Kong, where the first cases have yet to be decided. Each chapter answers a consistent set of questions, thereby allowing comparison across diverse jurisdictions. And it offers the reader a detailed summary of applicable rules as well as an overview of the enforcement climate.

A high-level summary cannot do justice to the careful contributions of the various authors of this guide. In this introduction, though, we draw attention to a number of important recent trends.

Excessive pricing: the Lazarus of antitrust

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

In 2003, however, the former Chief Economist at the European Commission's Directorate General for Competition made the following insightful prediction: 'if the number of excessive pricing cases in the EU has been relatively modest (albeit not insignificant) until now, it may increase in the future due to the combined effects of the liberalisation of network industries and the decentralisation of the European antitrust' (Motta and de Streel, 8th Annual European Union Competition Workshop, Florence, 2003). That prediction is proving to be prescient.

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

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

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

The technology sector: novel theories and parallel investigations

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

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

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

In 2015, China's NDRC imposed a fine on Qualcomm of US$975 million in 2015 for failure to license its standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. Subsequently, the Korean Fair Trade Commission fined Qualcomm US$854 million for unfair patent licensing practices. Likewise, the US FTC has recently filed a complaint against Qualcomm, alleging that it used its monopoly position in supplying baseband chips for mobile phones to impose anticompetitive licensing terms on SEPs. In particular, the FTC alleges that Qualcomm required customers to pay elevated royalties on products that use baseband chips made by rivals, thereby excluding competitors.

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

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

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

Interaction of antitrust and intellectual property

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

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

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

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

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

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

A new dawn for effects analysis?

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

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

This risk was similarly addressed by a High Court judgment in the UK, which involved a standalone private action by Streetmap alleging that Google's placement of a Google Maps 'thumbnail' at the top of the Google Search results page foreclosed competitors. Finding no infringement, Roth J observed that absence of 'actual effects' was a very important consideration. He explained that he would 'find it difficult in practical terms to reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect'.

The move to a closer effects analysis is mirrored in Australia, where proposed reforms to antitrust legislation aim to introduce an effects standard for assessing unilateral conduct. The revised regime will prohibit a corporation that has a substantial degree of power in a market from engaging in conduct that has the purpose or likely effect of substantially lessening competition. In the explanatory memorandum, the reframing is described as shifting the focus of the provision on the competitive process rather than individual competitors and allowing anticompetitive conduct to be better targeted.

Argentina

Miguel del Pino and Santiago del Rio
Marval, O'Farrell & Mairal

General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Antitrust Law No. 25,156 (the Antitrust Law) is the central legal act governing the Argentinian competition law. Sections 4 and 5 of the Antitrust Law specifically deal with the notion of dominance, while section 2 includes certain dominance conducts as examples of anti-competitive conducts. Furthermore, the Civil and Commercial Code includes a provision prohibiting abuse of a dominant position, but does not provide a definition of what should be understood by such notion.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

In order to determine the existence of a dominant position, section 4 of the Antitrust Law sets out that a person holds said position when: (i) it is the only buyer or supplier of a given product within the market; (ii) when, without being the only supplier or buyer, it lacks substantial competition; or (iii) it is able to determine the economic feasibility of competitors because of a certain vertical or horizontal degree of integration. Section 4 envisages the possibility of a joint dominance scenario, which has been stated in certain precedents of the Antitrust Commission. In addition, section 5 establishes three relevant factors to determine the existence of a dominant position: the degree of substitution for a product or service; the existence of regulatory barriers; and the extent to which a company can unilaterally set prices or restrict output. There are no market share thresholds to determine dominance.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The Antitrust Law does not set out that a dominant position is anticompetitive per se, since its section 1 states that those conducts sanctioned by the law are the ones that may generate harm to the general economic interest. In that regard, the concept of general economic interest has been analysed by both the Antitrust Commission and legal commentators as being directly connected to the notion of consumer surplus.

A non-exhaustive list of abuse of dominant position conducts is provided under section 2 of the Antitrust Law, but said description must only be taken into account for illustrative purposes, since the threshold in all cases will be whether the conduct has had an impact regarding the general economic interest.

There have been certain cases in which the Antitrust Commission has analysed factors beyond the general economic interest and more related to industrial policy matters. In a resolution of the previous administration of the Antitrust Commission that dates back to January 2012 (Secretary of Domestic Trade Resolution No. 6, dated 26 January 2012), it was stated that:

> *the antitrust policy in Argentina must be consistent with the economic policy in force during recent years. The competition policy ensures that there are no consumer rent transfers to undertakings that hold a dominant position (exclusive or joint) due to anticompetitive conducts or structural changes that imply an increase in the concentration within markets.*

It remains to be seen whether this interpretation will be maintained by the current administration of the Antitrust Commission, which took office in 2016.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There is no sector-specific competition regulation regarding dominance rules.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Section 3 of the Antitrust Law sets out that it is applicable to 'all persons or companies, either public or private, that carry out economic activities, either with or without the purpose of obtaining a profit, in all or part of the national territory and those that carry out economic activities outside the country, as long as their acts, activities or agreements may generate effects in the national market'. There are no specific exemptions to dominance rules set out in the Antitrust Law and the analysis is carried out by the Antitrust Commission on a case-by-case basis.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

In order for a unilateral conduct to infringe the Antitrust Law, a dominant position should be duly evidenced. There are no specific precedents regarding the actions of non-dominant firms regarding unilateral actions. As mentioned, sections 4 and 5 set out the criteria for a company to be considered dominant but do not envisage the scenario as regards the transition from non-dominant to dominant.

7 Collective dominance

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

Section 4 includes the notion of joint dominance, when two or more companies meet the criteria set out therein. While there are precedents in which the existence of joint dominance has been stated by the Antitrust Commission, its determination was solely referenced to the requirements set out in the Antitrust Law, without further analysis. Furthermore, in several cases, such as *Commission v YPF and others* or *Hugo Atilio Riello Gasperini and others re Intervention of Antitrust Commission*, the notion of joint dominance has been dismissed by

either the Antitrust Commission on its final decision or by the Court of Appeals.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Section 4 specifically states that it applies to single buyers. The Antitrust Commission has held that the exercise of monopsony power is not a per se violation, but that it might be one if it entails an abuse of dominant position, thus generating harm to the general economic interest. In *Commission v Industrias Welbers*, the Antitrust Commission determined that the use of monopsony power in order to impose credit conditions beyond the normal course of business was a clear abuse of dominant position, since the firm used its position in the sugarcane acquisition market to unnecessarily delay payments to its suppliers. Monopsony cases have been seldom analysed by the Antitrust Commission.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Relevant product and geographic markets are defined based on the small but significant and non-transitory increase in price test. There is no conduct-specific regulation regarding these definitions and, as such, the Guidelines for the Control of Economic Concentrations enacted by Resolution 164/2001 issued by the Secretary of Competition, Deregulation and Defence of the Consumer are used in order to define relevant product and geographic markets, through an SSNIP-type analysis.

There are no market share thresholds that would presume the holding of dominance, be it individual or collective. There is in fact no threshold at all that can be used in order to determine dominance and the Commission carries out such analysis on a case-by-case basis.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

There are no per se anticompetitive conducts. In order for a conduct to be deemed as anticompetitive, its potential to generate harm to the general economic interest will be analysed. Under the current Antitrust Law, it is the effect on the general economic interest rather than the type of conduct that determines that a practice is abusive.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse includes both exploitative and exclusionary practices. Section 2 contains a non-exhaustive list of prohibited practices, among which the following provisions are included:

- establishing obligations to produce, process, distribute, purchase or market a restricted or limited amount of goods or providing a certain restricted or limited number, volume or frequency of services;
- regulating markets for goods or services through agreements to limit or control technological research and development, production of goods or provision of services or to hinder investments for the production or distribution of goods or services;
- conditioning the sale of a good upon the purchase of another or upon the use of a service, or conditioning the provision of a service to the use of another or the purchase of a good;
- subjecting a purchase or sale to the condition of not using, purchasing, selling or supplying goods or services produced, processed, distributed or marketed by a third party;
- imposing discriminatory conditions for the purchase or sale of goods or services on reasons that are not based on customary trade usages or business practices;
- refusing, without reasonable grounds, to fulfil specific orders for the purchase or sale of goods or services under current conditions in the particular market;
- taking advantage of a dominant market monopoly to discontinue the supply of a public service or a public utility rendering public services; and
- selling goods or providing services at prices below their cost, without justification based on customary trade usages or business practices, with the purpose of removing competition in the market or damaging the goodwill or financial status or value of the trademarks of the suppliers of those goods or services.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Upon its analysis of dominance-related cases, the Antitrust Commission has resorted to an analysis of the position of the company in the market in order to determine the link between dominance (be it individual or joint) and the conduct. Conducts in adjacent markets have usually involved tying practices, by means of which a dominant position in a market is used in order to leverage the position in another one.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The Antitrust Law sets out an anticompetitive conduct investigation process in which parties are able to fully defend themselves. Defences to an allegation of abuse of dominant position that can be invoked include challenges on market definition, external factors (eg, inflation), countervailing buying power, technological changes and their effects on dominance, among others. Efficiency gains have not been a particular matter of interest to the Antitrust Commission, both as regards conducts and merger control.

Specific forms of abuse

14 Rebate schemes

Rebates are not specifically listed by the Antitrust Law, but in the event that they could be considered as exclusionary or entailing predatory pricing, they could be subjected to investigation by the Antitrust Commission. We are not aware of any specific precedent-addressing rebates.

15 Tying and bundling

Tying arrangements have been considered as anticompetitive and have been the subject of several investigations. Section 2(i) of the Antitrust Law characterises these agreements as 'Conditioning the sale of an asset to the acquisition of another one or the hiring of a service or conditioning the usage of a service to the hiring of another one or the acquisition of an asset'.

Regarding possible exemptions, in *Ferrari v Supercanal* the Antitrust Commission held that an offer of secondary supplemental services that could be freely rejected by the customer without termination of the primary contract could not be considered a tie-in sale. Furthermore, in *Ferrari v Plan Ovalo,* it also disregarded a claim regarding alleged restrictions to acquire insurance services in car financing systems other than the ones suggested by said companies, since the existence of several separate insurance offers was available. It also highlighted the interest of the party providing financing to the prospective buyer for the acquisition of the car to set out specific requirements so as to be duly covered in the event of an accident while the financing payments are outstanding.

16 Exclusive dealing

In *Pregal v Basualdo and others*, the Antitrust Commission held that in the event that the market under analysis is supplied or competitive, producers and distributors must be guaranteed their freedom to conduct business in the manner of their choice. In S*ADIT v Massalin and others*, the Commission held that the imposition of exclusive

intra-brand distribution can have a twofold effect. On the one hand, it can be anticompetitive if it results in a market power increase, allows market power to be exercised in a more efficient manner, or restricts the entry of new competitors. On the other hand, exclusive distribution can also be pro-competitive if the parties had the prior option of contracting with other parties or if the exclusivity generates savings of costs or increases the quality of the products, given the economic benefits of certain vertical restraints.

17 Predatory pricing

This conduct is sanctioned as per section 2(m) of the Antitrust Law, which describes it as 'Selling goods or providing services at prices below cost, without a reason based on commercial usual practices in order to exclude competition in the marke'. The Antitrust Commission has determined the conditions that must exist in order to establish predatory pricing, namely, dominant position, intent to carry out a market exclusion of competitors and barriers of entry so as to prevent the entry of new competitors after the pricing, and to be able to recoup the losses caused by predatory pricing.

In the event those circumstances are met, predatory pricing liability may be established if the dominant firm's prices were below average total cost (the sum of all of the production costs divided by the number of units that are produced) or incremental cost in certain cases (the increment in the total cost resulting from increasing in one additional unit the supply of a product).

Regarding exemptions, in *Cámara Argentina de Papelerías y Librerías v Supermercados Makro*, the Antitrust Commission held that should the sale be carried out for a limited amount of time (ie, in this case it was for 15 days) and for a promotional reason, no anticompetitive conduct could be construed. It has also stated that no predatory pricing can take place on public bids (pursuant to *Stella Marias Alvarez v Cooperativa de Electricidad Bariloche Ltda*) and that lower pricing as a result of an industrial promotion regime (which entails the granting of economic benefits (such as tax discounts or loans) for companies to start operating in Argentina) could not be considered as unlawful by the regulator, since it fell beyond its scope of analysis, as shown in *Cámara Argentina de la Motocicleta v Zanella Hermanos y Compañía*. The reason for that is that decisions that were taken by a regulator to increase sales could not entail an antitrust infringement.

In the recent *Universal Assistance v Assist Card* case, the regulator analysed whether the defendant used its dominant position with a 65 per cent market share on the relevant market of travellers' global insurance in order to incur in predatory pricing. The Antitrust Commission, in its analysis, indicated that the plaintiff (Universal Assistance SA) had not proven that the offers and discounts provided by Assist Card were inferior to the average industry costs making them anti-economic. Furthermore, given that discounts of up to 65 per cent of the price were only offered by the defendant for a limited period of time and for specific products, the practice fulfilled the parameters set out in previous rulings of the Commission. Under this reasoning the complaint was finally dismissed.

18 Price or margin squeezes

Precedents have mostly been related to refusal to deal scenarios, rather than price or margin squeeze.

19 Refusals to deal and denied access to essential facilities

This conduct is described under section 2(l) of the Antitrust Law, which describes it as: 'To deny with no justification the provision of a specific request for the acquisition or sale of an asset or hiring of a service that had been carried out in the current conditions of the corresponding market'. The Commission has held that refusals to deal may be unlawful in cases where the supplier could offer no specific commercial reasons for its refusal other than the connection of the rejected party to a competing group of the supplier (*Decoteve v Pramer*). In the majority of the cases that involved an alleged refusal to deal behaviour, the Antitrust Commission rejected said claims by stating that the real grounds for those allegations were commercial or business disagreements between the supplier and the purchaser of a product. It has stated in several cases, such as *Casa Amado v Massalin or Kosloff v IATA – JURCA,* that an abuse of dominant position must be proved, as opposed to the freedom of the parties to carry out a commercial agreement. Factors such as a spotty credit history or lack of a track record on a specific industry have been accepted as justifications for refusal to deal. Another factor that has been taken into account by the Antitrust Commission in upholding refusals to deal is the existence of alternative and adequate sources of supply, as evidenced in *Ferretería Alborelli v ROR Mayorista*.

Regarding essential facilities, while this conduct is not expressly described by the Antitrust Law, the Antitrust Commission has analysed several cases regarding this matter. In *A Savant v Matadero Vera,* the Antitrust Commission held that the granting of a public authorisation (in this case, the running of a slaughterhouse in a small town) created a responsibility to satisfy demand of all sorts, even from competitors in the downstream market and that any denial to supply would have to have a valid business justification. In *Empresa Almirante Guillermo Brown and Others v Terminal Salta*), the Antitrust Commission considered that the owner of a transport company who also owned the sole bus terminal in a town had to allow the other transport companies access to it, on equal terms. As such, it stated that while companies had the freedom to determine their own agreements, dominant companies could not block access to their competitors in the downstream market without a valid commercial justification, while also leaving on record that denial of access to the terminal would entail a monopoly in the downstream market.

20 Predatory product design or a failure to disclose new technology

There are no specific precedents in this regard. The current Antitrust Law has no current provisions regarding pay-for-delay type of practices. However, the draft for a new Antitrust Law that has been sent to Congress specifically addresses such matter. Said draft lists as a possible antitrust offence the following: 'To regulate markets of assets or services, by means of agreements that limit or control the investigation and development of technology, the manufacturing of assets or rendering of services or to encumber investments destined to the manufacturing of assets, rendering of services or their distribution.'

21 Price discrimination

Price discrimination falls under section 2(k) of the Antitrust Law, which carries the following description 'To impose discriminatory conditions for the acquisition or selling of assets or services without reasons based on usual commercial practices of the corresponding market'. The guidelines for the determination of price discrimination can be found in *Lafalla v Juan Minetti* in which it was considered that for a violation based on this conduct to be found, three factors were necessary, namely: the possibility to effectively carry out a segmentation of the market, the encumbering or restriction of reselling the product and the existence of dominance. Additionally, an adequate geographical market definition was proved to be essential as set out in *Falcioni v EG3* since that could be a factor to be taken into account for the differentiation in the pricing.

The most relevant precedent regarding price discrimination was resolved in 1999 in the C*ommission v YPF and Others* case when the local petroleum company received a significant sanction for abuse of its dominant position by using discriminatory pricing in the liquid gas market. Under the currency exchange of said date, the fine imposed by the Antitrust Commission to the infringing company was US$ 109 million.

22 Exploitative prices or terms of supply

Excessive pricing has been analysed in several markets such as medicine supplies in *Commission v Bago and Others*, in which the Antitrust Commission held that significant increases in price that had no foundation in legitimate commercial reasons could point towards the existence of an abuse of dominant position. As to valid commercial reasons, the Antitrust Commission has accepted factors beyond the scope of the supplying company, such as the imposition of foreign surcharges, as well as specific industry factors. It has also discarded accusations regarding abusive pricing when said prices were regulated by the state, as shown in *Torrisi v El Popular*.

23 Abuse of administrative or government process

Sham litigation cases have been analysed by the Antitrust Commission. In a recent case, *Laboratorio Elea v Roche*, it considered that in order to prove sham litigation, based on US rulings, a sham test must be

performed, consisting of two parameters: the complaint must have no sustainable grounds to stand on, meaning that no reasonable litigant would expect to win in court; and the complaint must reflect subjective intent in using the judicial proceedings as an anticompetitive tool.

24 Mergers and acquisitions as exclusionary practices

The Antitrust Law has a separate proceeding set out for merger control review and a complete analysis of a transaction is carried out, including whether as a result of the transaction, the resulting entity will have the power to carry out exclusionary practices. Determining that such would be the case, the Antitrust Commission would impose remedies to the parties in order to eliminate any possible competitive problems. In principle, if the transaction does not fall under the merger control thresholds, the Antitrust Commission would not be able to review it unless the relevant parties were involved in anticompetitive conduct.

25 Other abuses

The Antitrust Commission has analysed Resale Price Maintenance conducts in several cases and is included in the Antitrust Law, as follows: 'To set, impose or carry out, directly or indirectly, in agreement with competitors or individually, on any manner, prices and conditions for the acquisition or sale of assets, rendering of services or manufacturing'.

The printing of recommended resale prices in the products has been considered by the Antitrust Commission as competitive, as long as the reseller retains the freedom to choose the final price, as stated in *Federación Argentina de Supermercados y Autoservicios v Danone*.

Regarding maximum resale prices, the Antitrust Commission has considered that they have a positive benefit on consumers since they usually increase the welfare of the consumers who end up paying lower prices.

As to minimum resale prices, in *Commission v Clorox*, the Antitrust Commission held that the imposition of RPM was anticompetitive. In this case, Clorox was accused of imposing its own resale price to the points of sale, in addition to the enforcement of a price gap between the price of its bleach and the prices of its competitors' bleach. As such, the RPM practice not only entailed Clorox's own offerings, but also its competitors.

In a recent case, the Antitrust Commission analysed the matter of aggressive marketing campaigns. In *Sancor v Danone*, Sancor submitted a complaint against Danone for allegedly initiating certain motivational information packages to its staff with the purpose of excluding or diminishing the presence of products manufactured by Sancor in various retail sales points. In this sense, Danone allegedly had the objective of limiting and diminishing competition affecting the general economic interest to achieve a monopolist presence in the yogurt's market. However, the Antitrust Commission considered that the practices carried out by Danone and acknowledged by the company were a training plan addressed to specific staff, which had the purpose of strengthening competition by the use of certain language that could motivate the staff to increase the company's market shares. In effect, the Commission understood said plan to be a pro-competitive practice since it encouraged competition between companies.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Antitrust Law provides the Antitrust Commission with several standard enforcement powers, such as the ability to summon witnesses for hearings, examinations of books and documents, the issuance of requests of information to other regulators, the initiation of investigations ex professo and the execution of dawn raids with a court order.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

According to the Antitrust Law, in the event that an infringement is proved, a cease of the infringing conduct will be ordered and a fine can be imposed on the perpetrators, which can range from 10,000 Argentine pesos to 150,000 pesos per accused party. The value of the fines is set out in Argentine pesos and, owing to the devaluation of the peso, there has been a decrease in its conversion value. A bill for a new Antitrust Law has been sent to Congress to update the fines.

The amount of the fine is based on the loss incurred by the affected parties, the benefit that was obtained by the infringing party and the value of the assets involved. The amount of the fine can be doubled in the event of a repeated offence. The fine can also be set up in a joint manner with the directors, managers, administrators and supervisory members of the infringing companies that would have caused the anticompetitive conduct either by their action or inaction. A sanction for not carrying out trade activities from one to 10 years can also be set.

One of the highest fines ever imposed regarding dominance cases was in the *Commission v YPF and Others* (Case No. 064-002687/97, 1999) case regarding price discrimination, when the local petroleum company received a significant sanction for abuse of its dominant position by discriminating prices in the liquid gas market. Under the currency exchange of said date, the fine imposed by the Antitrust Commission to the infringing company was US$109 million.

Finally, the Antitrust Law also sets out that when dominant position abuses have been verified, the Antitrust Commission may order the setting of remedies to neutralise the distortive effects over competition or to request a court for the infringing company to be dissolved, liquidated or splintered.

Update and trends

The Antitrust Commission has recently sent a draft for a new Antitrust Law to Congress. Among its new features, the following are the most noteworthy:

- the creation of a new Antitrust Authority;
- the inclusion of pay-for-delay practices as anticompetitive;
- infringing parties can be fined as follows (i) 30 per cent of the volume of business of the products or services involved in the anticompetitive conduct over the past year, multiplied by the number of years over which the conduct took place; (ii) 30 per cent of the local volume of business of the infringing group over the last fiscal year; or (iii) twice the amount of the economic benefit obtained by the anticompetitive conduct; the deciding factor being the highest fine possible under these items. In the event that the fine could not be determined by using these factors, then a fine of up to 200 million Indexable Units (which are created by the bill) can be imposed, which amount to approximately US$200 million;
- the elimination of the *solve et repete* system; and
- the creation of a new court of appeals solely for antitrust matters.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Antitrust Commission is empowered to impose sanctions on its own, carved out by means of recommendation to the Secretary of Trade (ultimate enforcer).

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In recent years, dominance cases have been the subject of great scrutiny by the Antitrust Commission in an effort to contain inflation. Several market investigations have been initiated on a wide range of markets (such as pharmaceuticals, oil and supermarkets) in order to determine the existence of an abuse of dominant position. However, owing to the very slow review time frames of the regulator, there have been no significant precedents in that regard. Anticompetitive conducts investigations tend to be quite slow in their review and generally take over five years, although the new Antitrust Commission Administration has expressed its interest in pursuing a swifter investigations process.

Upon the entering in office of the new Administration, there was the announcement of several market investigations to be initiated in the following markets: aluminium, steel, petrochemical products, mobile communications, credit cards and electronic payment, edible

oil, milk, meat, detergent, local bus transportation and air transportation. The Antitrust Commission is currently carrying out a joint dominance investigation in the credit cards market.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

It ultimately depends on the drafting of the agreement, but rules on interpretation of contracts indicate that the clause would be deemed as invalid, rather than the entire contract.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

This type of requests would be handled by means of claims before the Antitrust Commission, rather than a request before courts, the sole exemption being if an injunction were to be requested in order to later file a claim before the Antitrust Commission.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Pursuant to section 51 of the Antitrust Law, any individual or legal entity suffering damage from any conduct or act prohibited under the Antitrust Law has the right to file a private action for damages in accordance with the civil law provisions.

Damages can be requested pursuant to the provisions set forth in article 1716 of the Civil and Commercial Code, which states that the violation of the duty of not causing damage to another person gives rise to the compensation for such damages. Those actions are ruled by the Civil and Commercial Code and must be filed before the competent courts within the jurisdiction of the defendant's domicile. The basic rule derived from the provision is that whoever causes damage intentionally or owing to negligence is liable to the damaged party.

As of today, there has only been one major case entailing private antitrust litigation, namely the *Auto Gas* case (sentence issued by the National Commercial Court No. 14, Clerk's Office No. 27, on 16 September 2009), in which the plaintiff was awarded 13,094,457 pesos owing to the damages caused by an abuse of dominant position. In *Auto Gas*, the Court merely referred to the analysis carried out by the Antitrust Commission and established a connection between the conduct that the Commission found illegal and the damages suffered by the plaintiffs. However, the fact that the Argentine Civil and Commercial Code already contains provisions allowing for private damages actions leaves the door open for courts to analyse cases that have not been decided by the Commission, namely to investigate anticompetitive acts in order to determine the conduct constituted a violation of the law and then determine the appropriate reparation for damages.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Pursuant to the current drafting of the Antitrust Law, in order to file the appeal against the administrative resolution that imposed a sanction of fine, the amount of the fine will have to be deposited in the name of the authority that set it out and the receipt for said deposit must be filed with the appeal, without which it will be considered as rejected, 'unless said performance could generate an irreparable harm to the appealing party'. As such, there is currently a *solve et repete* system in place, by means of which the appeal will only be granted if payment of the fine has been carried out, unless 'irreparable harm' can be shown, of which no guidelines or parameters are provided.

Over the past decade there has been a discussion generated as to whether the court of appeals would have to be the Federal Court of Appeals on Civil and Commercial Matters or the National Court of Appeals on Criminal Economic Matters and both appellate bodies have issued resolutions on matters arising from the Antitrust Law. Pursuant to the current drafting of the Antitrust Law, upon the filing of an appeal, 'the enforcement authority will send the appeal with its answer to the National Court of Appeals on Consumer Relations or the applicable Court of Appeals' (the latter reference is made regarding the intervention of other Court of Appeals beyond the scope of the city of Buenos Aires). However, since said body has not yet been created, the interpretative discussion between both courts remains in place.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

While unilateral conducts would be applicable in principle to dominant firms, it must be taken into account that should the Antitrust Commission carry out a joint dominance interpretation of a case as it has done in the past it may deem that, even though no dominant position is held, an anticompetitive conduct may be nonetheless be determined.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The Competition and Consumer Act 2010 (Cth) (CCA) deals with the unilateral conduct of firms with a substantial degree of power in a market, which is a lower threshold than dominance. Specifically, section 46(1) of the CCA prohibits corporations with a substantial degree of market power from taking advantage of that power in that or any other market for one of the following purposes, which may be ascertainable by inference only:

- eliminating or substantially damaging a competitor;
- preventing entry into that market or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that market or any other market.

Section 46(1AA) (known as the Birdsville Amendment) prohibits below cost pricing for a sustained period by corporations with a substantial share of the market (see question 17).

Section 46A prohibits the misuse of market power by firms with a substantial degree of market power in trans-Tasman markets (see question 9).

In addition, a telecommunications carrier or carriage service provider that has a substantial degree of power in a telecommunications market is prohibited from taking advantage of that power with the effect or likely effect of substantially lessening competition in a telecommunications market (see Part XIB of the CCA).

As noted in more detail in 'Update and trends', following a series of reviews and consultation processes, section 46 is likely to be substantially reframed to include an effects test.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The relevant concept under the CCA is a substantial degree of power in a market, which is a lower threshold than dominance. Market power has been interpreted by the courts to mean the ability of a firm to act without competitive constraint. Such market power may be evidenced by a firm's ability to:

- raise prices to supra-competitive levels for a non-transitory period of time without its rivals taking away customers;
- withhold supply; and
- determine non-price terms and conditions.

Financial strength alone is not an indicator of market power.

'Substantial' has been defined as something 'considerable' or 'large' but less than 'commanding a market' or a 'monopoly'. The CCA also specifies that a corporation may have a substantial degree of market power even if it does not (section 46(3C)):

- substantially control the market; or
- have absolute freedom from constraint by the conduct of competitors, suppliers and customers.

More than one firm may have a substantial degree of power in a market (section 46(3D)) and a supplier or an acquirer in that market could have market power (section 46(4)(c)).

The question of whether a firm has a substantial degree of market power is interconnected with the question of market definition and is analysed by the court after the identification of the relevant market (see question 9).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The CCA contains an object clause (section 2) that highlights the CCA's dual role of promoting competition and protecting consumers, stating that 'the object of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.' The courts have also found that the objective of section 46 is to promote competition rather than the interests of particular persons or corporations. Section 46 and other provisions in Part IV of the CCA draw on economic concepts, though, over time, notions of efficiency and consumer welfare may have developed beyond their strict economic meaning. While the CCA has not been interpreted as protecting other interests, the CCA must be viewed in its broader political context. This political context has flow-on effects for how the CCA is enforced. The enforcement of section 46, for instance, has focused in particular on the extent to which a firm's conduct is facilitated by its market power. The proposed amendments to section 46 have been promoted as intended to support small business.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There is sector-specific regulation of telecommunications and energy. Part XIB of the CCA deals with anticompetitive conduct in the telecommunications industry and Part XIC contains a telecommunications access regime. Energy infrastructure at the transmission and distribution level is regulated under the National Electricity Law or the National Gas Law.

Sector-specific regulation applying to the telecommunications and energy industries operates alongside the general misuse of market power prohibition in section 46 of the CCA.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The misuse of market power provisions apply to corporations. This includes foreign, trading or financial corporations, as well as both public and private corporations. No legislation binds the Crown, or public entities such as government departments and public corporations, unless the legislation expressly names the Crown or implies that the Crown is to be bound. This principle is referred to as Crown immunity. The CCA expressly binds public entities only to the extent that they are 'carrying on a business', which includes a business not carried on for

profit. Collecting taxes, licensing and transactions involving persons who are all acting for the same authority (Commonwealth, state or territory) and non-commercial public authorities are not activities that amount to carrying on a business. The CCA does not bind the Crown if it is not carrying on a business. However, private corporations dealing with the Crown will not be protected by any immunity deriving from the Crown's immunity. A private corporation must, therefore, consider whether its conduct could breach section 46 of the CCA when entering into an agreement with the Crown even if the Crown's conduct may be subject to Crown immunity.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Section 46 of the CCA only applies to the conduct of a firm with a substantial degree of market power. If a firm does not have a substantial degree of market power (see question 2), then its conduct is not covered by section 46 of the CCA. This is the case even if the relevant conduct would result in the firm obtaining or acquiring a substantial degree of market power. However, the 'taking advantage of' conduct does not need to take place in the same market as the market in which the firm has market power.

There was some public concern (not universal) that the CCA did not cover situations where firms acquire market power incrementally through small-scale mergers or acquisitions ('creeping acquisitions'). 'Creeping acquisitions' refer to mergers or acquisitions that, individually, do not substantially lessen competition, but collectively may do so. An amendment to section 50 of the CCA, which came into effect in February 2012, sought to address these concerns. The amendment involved two key changes: the removal of the requirement that a market be 'substantial' and the replacement of 'a relevant market' with 'any relevant market'. While the changes have not yet been tested in court, the Australian Competition and Consumer Commission (ACCC) has been reviewing (and opposing) small-scale mergers and acquisitions, including the acquisition of single supermarkets or stores.

7 Collective dominance

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

Currently, there is no separate concept of collective dominance in Australia. However, more than one corporation may have a substantial degree of power in a market (section 46(3)), and in determining whether a corporation has a substantial degree of market power, a court may:

- combine the market power of the corporation and its related entities (section 46(2)); and
- take into account any market power derived from contracts or arrangements with others (section 46(3A)).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The legislation applies equally to suppliers and purchasers who have a substantial degree of market power.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The concept of a 'market' is used in most of the prohibitions in Part IV of the CCA, including section 46. The test for market definition is consistent across these prohibitions. A 'market' is defined in section 4E of the CCA as 'a market in Australia and, when used in relation to goods or services, includes a market for those goods or services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods and services'. This definition makes clear that the parameters of a market are governed by the concepts of substitution and close competition. The definition also embodies the 'small but significant non-transitory increase in price (SSNIP) test' for defining markets, which seeks the narrowest product and geographical space over which a hypothetical monopolist could impose a SSNIP.

While the definition of 'market' refers to a market in Australia, section 46A relates to the misuse of market power in a market in Australia, New Zealand, or in both. This has ramifications for trans-Tasman trade and expressly expands the applicability of the CCA to such markets.

There is no market-share threshold above which a company will be considered to have a substantial degree of market power. Market power is a question to be determined on a case-by-case basis. In practice, a high market share may be an indicator of market power, but is only one indicator among other factors, such as barriers to entry and expansion. However, there have been cases where a corporation with a 20 to 30 per cent market share has been found to have a substantial degree of market power.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 46 of the CCA is directed at prohibiting a firm with a substantial degree of market power from taking advantage of that power for a proscribed purpose. Currently, it is not necessary to show that the taking advantage of market power has any anticompetitive effect. It is also not directed at the prohibition of possession of a substantial degree of market power, although the existence of that power is a precondition for section 46 (see question 2). Rather, the prohibition is focused on the misuse of market power for an anticompetitive purpose, which may be inferred from conduct (see section 46(7)).

Following amendments to the CCA in 2008, section 46(6A) now contains a non-exhaustive list of factors to which a court may have regard when considering whether a firm has taken advantage of its market power. These factors, taken from judicial reasoning in section 46 cases, are:

- whether the conduct was materially facilitated by its market power;
- whether the corporation engaged in the conduct in reliance upon its market power;
- whether the corporation would be likely to engage in that conduct if it lacked substantial market power; and
- whether the conduct of the corporation is otherwise related to its substantial degree of market power.

These factors make clear that there must be a connection between a firm's proscribed conduct and its substantial degree of market power.

For there to be a breach of section 46, the firm's conduct must be for one of three proscribed anticompetitive purposes (see question 1).

The courts have found in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989), *Boral Besser Masonry Ltd v ACCC* (2003) and other cases that meeting competition is a legitimate purpose and have cautioned against confusing aggressive competitive intent with anticompetitive behaviour. However, direct evidence of purpose is not necessary. As noted above, purpose can be inferred from a firm's conduct, the conduct of any other person or the relevant circumstances.

For telecommunications carriers and carriage service providers that have a substantial degree of market power, abuse is defined by reference to a likely anticompetitive effect, rather than purpose.

As noted in question 1, the proposed new section 46 will include an effects test, as well as a purpose test.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The misuse of market power prohibition will only cover exploitative and exclusionary practices to the extent that it involves taking advantage of a substantial degree of market power for a proscribed purpose. It is less common for exploitative practices to be caught under the prohibition as courts have typically distinguished between conduct to meet competition and conduct that is anticompetitive. For example, utilising market power for defensive price cutting or profit maximisation may not be caught by the section 46 prohibition except where it is engaged in for a proscribed purpose. Exclusionary practices may be

caught by the prohibitions against agreements containing exclusionary provisions (sections 4D and 45) and against exclusive dealing that substantially lessens competition (section 47).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

As discussed in question 10, there must be a link between a firm's substantial degree of market power and its conduct. The firm must misuse or 'take advantage of ' its market power before section 46 of the CCA is breached. The 'taking advantage' element may be proved if the firm is misusing its power in a market other than the one in which it has a substantial degree of market power.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

There are no specific defences that may be raised to allegations of misuse of market power, but efficiency gains may be invoked as a rationale to demonstrate that the behaviour did not amount to 'taking advantage' (see question 10). As noted above, 'meeting competition' also functions as a type of defence. A firm may also argue that it does not have a substantial degree of market power or that its substantial purpose was not a proscribed purpose.

As noted in question 17, in relation to a predatory pricing allegation under section 46(1) of the CCA, an inability to recoup is no defence.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may contravene section 46 if they amount to predatory pricing , price squeezes or are otherwise considered to be a misuse of market power under section 46 (see questions 17 and 18).

Under section 46, the form of discounting does not matter; either retroactive or incremental rebates could potentially be a contravention if the corporation has market power and uses that power for a proscribed purpose.

15 Tying and bundling

Tying and bundling may contravene section 46 if they are engaged in by a firm with substantial market power and subject to establishing the other elements of a breach of section 46. Notably, a firm may breach section 46 by taking advantage of market power in one market for a proscribed purpose in relation to another market (in which it may not have a substantial degree of market power). In *ACCC v Baxter Healthcare Pty Ltd* (2008), the Full Federal Court found that Baxter had substantial power in the market for sterile fluids, of which it took advantage by offering bundles of its sterile fluids with its peritoneal dialysis (PD) products for a prohibited purpose. The bundled package was cheaper than the individual products separately. The court also found that Baxter had the proscribed purpose of deterring or preventing competition from rival suppliers of PD products.

16 Exclusive dealing

Exclusive dealing is typically addressed under section 47 of the CCA, which applies to all firms regardless of market power. Most forms of exclusive dealing are subject to a competition test and will only be prohibited where they have the purpose, effect or likely effect of substantially lesseninh competition. The courts have found that exclusive dealing in the form of exclusive distributorships or other non-price vertical restraints may be pro-competitive in that they may restrict intra-brand competition but promote inter-brand competition (see *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001)). However, this is not always the case. In *Universal Music v ACCC* (2003), the Federal Court found that the parallel importing vertical restriction that Universal and Warner wanted to impose on distributors was not pro-competitive and was a strategy designed with an anticompetitive purpose in mind.

The only form of exclusive dealing that is prohibited outright is third-line forcing, which is where a corporation supplies goods or services on condition that the acquirer obtains goods or services from another person. Corporations wishing to engage in third-line forcing are required to notify the ACCC and seek immunity for the proposed conduct.

Non-compete provisions are more likely to be dealt with under the civil or criminal prohibitions on cartel conduct, which apply to market-sharing agreements between competitors (ie, agreements that allocate customers, suppliers or territories). There is no requirement of market power under the cartel prohibitions.

17 Predatory pricing

Predatory pricing can be caught by the general misuse of market power prohibition (section 46(1)) or by section 46(1AA), which specifically prohibits pricing below the 'relevant cost' of supply for a sustained period for a proscribed purpose by a corporation with a substantial share of a market (see question 1). The legislation also provides that a corporation that engages in below-cost pricing for a sustained period may be taking advantage of its market power in breach of section 46(1) even if there is no ability to recoup (section 46(1AAA)).

This provision was introduced in response to the High Court's observation in *Boral Besser Masonry Ltd v ACCC* (2003) that the prospect of recoupment by supra-competitive pricing may assist in determining whether price cuts are a result of competitive market pressure or a misuse of market power. There is some ambiguity as to whether section 46(1AAA) is also to be followed in interpreting section 46(1AA).

Unlike section 46(1), section 46(1AA) requires that a corporation has only a substantial share of a market rather than a substantial degree of market power, and there is no 'taking advantage' element. The introduction of section 46(1AA) was intended to lower the evidentiary burden associated with pleading a case under section 46(1) but, as in other jurisdictions, there may be difficulties associated with proving what the relevant cost of supply is in a particular case. Section 46(1AA) has not been tested by the courts since its introduction in 2007 but, in misuse of market power cases, the courts have adopted average avoidable cost as the appropriate measure of cost.

The most recent predatory pricing case is *ACCC v Cabcharge* (2010). The case was settled by admission, in which Cabcharge admitted to contravening section 46(1) by supplying taxi meters and associated fare schedule updates below cost for an anticompetitive purpose. As noted in question 29, penalties in relation to Cabcharge's admitted predatory pricing were A$3 million.

As noted in question 1, if the proposed changes to section 46 come into effect, the specific prohibition on predatory pricing in section 46(1AA) will be repealed.

18 Price or margin squeezes

A price squeeze by vertically integrated companies with a substantial degree of market power may constitute a breach of section 46 of the CCA if the elements of the offence are established. Alternatively, a price squeeze may be subject to a predatory pricing analysis under section 46(1AA). In both instances, the price squeeze must be accompanied by a proscribed purpose.

For the telecommunications industry, a firm may breach the CCA by taking advantage of market power even if there is no anticompetitive purpose. Part XIB of the CCA prohibits a telecommunications carrier or carriage service provider from engaging in anticompetitive conduct, which is defined as taking advantage of a substantial degree of power in a telecommunications market. However, this prohibition is a variant of section 46 as it does not require an anticompetitive purpose and is effects-based, that is, under Part XIB the misuse of market power must have the effect or likely effect of substantially lessening competition.

19 Refusals to deal and denied access to essential facilities

Section 46 is intended to prohibit conduct that restricts competition rather than the interests of particular persons or corporations. A refusal to deal is therefore not prohibited under section 46 unless it constitutes taking advantage of market power for a proscribed purpose. For example, in *Melway Publishing v Robert Hicks Pty Ltd* (2001), the High Court emphasised that a firm with substantial market power is under no legal obligation to appoint new wholesale distributors and recognised that non-price vertical restraints in distribution could promote inter-brand competition. There have been other cases where refusals to deal have been found to be justified by a supplier's legitimate business interests

(eg, *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) and *Regent's Pty Ltd v Subaru (Aust) Pty Ltd* (1996)).

As noted above, in *ACCC v Cabcharge* (2010), the ACCC obtained a penalty of A$11 million for admissions by Cabcharge relating to its refusal to allow competitor non-cash systems for payment to process Cabcharge cards.

There are, however, express prohibitions on refusals to supply in the CCA that apply to all corporations, including those without market power. A refusal to supply may be in breach of the CCA if it can be characterised as:

- an exclusionary provision or an agreement that has the purpose, effect or likely effect of substantially lessening competition (sections 4D and 45);
- exclusive dealing (section 47); or
- resale price maintenance (section 48).

In relation to access to essential facilities, section 46 does not create an obligation on owners of essential facilities to give third parties access to those facilities. However, if the elements of section 46(1) are made out (see question 10), it may be possible to use section 46 to create an access regime, though there would be some difficulties in framing the appropriate court orders (*NT Power Generation Pty Ltd v Power and Water Authority* (2004)). There is also a general access regime in Part IIIA of the CCA for bottleneck infrastructure and a telecommunications access regime in Part XIC. Aside from those access regimes, there is no separate 'essential facilities' doctrine in Australia.

20 Predatory product design or a failure to disclose new technology

There has not been a section 46 case in Australia on such conduct, although it may be possible to bring such a case if the required elements of section 46 are present. Such behaviour may also be caught by the civil or criminal prohibitions on cartel conduct if it involves an agreement between competitors. There is no requirement of market power under the cartel prohibitions.

21 Price discrimination

In general, price discrimination is not of itself always a misuse of market power. However, if price or non-price discrimination amounts to taking advantage of substantial market power for a proscribed purpose, then it may contravene section 46 of the CCA. Price discrimination is typically in the form of other conduct such as refusals to deal, bundling and price squeezing, which are discussed in questions 18, 19 and 15.

22 Exploitative prices or terms of supply

Merely charging excessively high prices or putting in place exploitative terms of supply is not a misuse of market power under section 46 unless all the elements of section 46 are made out and, in particular, it is established that the conduct was directed at a competitor (not merely a customer). The ACCC does, however, have the power to hold price inquiries in relation to the supply of goods or services under Part VIIA of the CCA. This price surveillance power enables the ACCC to declare goods and services to restrict a person's ability to increase the price of such goods or services during a specified period.

23 Abuse of administrative or government process

The use of government process to exclude rivals from a market or to increase rivals' costs may theoretically involve a breach of section 46. However, in practice, it would be difficult to establish that the use of a publicly available government process involved the taking advantage of market power and was for a proscribed purpose. Therefore, even if rivals of a firm with a substantial degree of market power are foreclosed as a result, section 46 may not provide any recourse.

24 Mergers and acquisitions as exclusionary practices

As noted in question 6, mergers and acquisitions are subject to a substantial lessening of competition test under section 50 of the CCA. New amendments to the CCA are intended to address 'creeping acquisitions' (see question 6) and acquisition of a substantial degree of market power over time through small, incremental acquisitions.

25 Other abuses

Aside from the predatory pricing provisions, section 46 of the CCA does not list particular types of conduct that would be a misuse of market power, and subject to establishing the elements of a breach of section 46, the type of conduct that may be proscribed is very broad.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The ACCC is responsible for enforcement of the CCA. It has extensive powers of investigation under Part XID of the CCA. These powers include:

- the power to compel the production of information and documents that relate to the alleged contravention;
- the power to compel particular persons to appear before the ACCC and provide oral or written evidence under oath; and
- the power to enter and search premises either with consent or pursuant to a warrant. While on the premises, the ACCC can ask questions of the occupants, make copies of material or seize relevant material (including electronic material).

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

For a contravention of section 46, the following sanctions and remedies may be imposed:

- a declaration that the conduct breaches the CCA;
- an injunction restraining the parties from engaging in the conduct or a mandatory order that a person engage in particular conduct;
- an order disqualifying a person from managing a corporation;
- an order for damages for those who have suffered loss or damage from the conduct including individuals; and
- ancillary orders.

Only the ACCC may seek pecuniary penalties. The maximum penalty for each contravention by a corporation is the greatest of the following:

- A$10 million;
- when the value of the benefit from conduct is ascertainable, three times the value of the illegal benefit; or
- when the value of the benefit from conduct is unascertainable, 10 per cent of the annual turnover, ending at the end of the month in which the conduct occurred.

For individuals, the maximum penalty is A$500,000. In rare circumstances, an individual may be liable as an accessory under section 75B of the CCA, if they have aided or abetted, or being knowingly concerned in, a contravention of section 46.

To assess the size of the penalty to be imposed, the court generally considers a number of factors, including the conduct, the loss or damage caused, the size of the company and the market, the degree of power and whether the conduct was deliberate.

To date, the highest fine that has been imposed for a breach of section 46 is A$14 million, which was imposed in the ACCC's proceedings against Cabcharge (see question 29).

In addition to the sanctions and remedies, the court may accept undertakings from parties that they will not engage in particular conduct. Court-enforceable undertakings may also be given to the ACCC under section 87B of the CCA.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

As noted in question 26, the ACCC has extensive powers of investigation. However, the ACCC has no power to enforce section 46 of the CCA directly, but must prosecute a breach and seek remedies from the Federal Court. As noted in question 27, those remedies may include a pecuniary penalty, as well as declarations and injunctions.

Update and trends

The Australian government is expected to pass the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 in early 2017.

In the Bill, it is proposed that section 46 be amended to include an effects test. The proposed section 46(1) will prohibit a corporation that has a substantial degree of power in a market from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market.

This formulation represents a significant shift away from the current prohibition. In the Explanatory Memorandum, the reframing is described as shifting the focus of the provision on the competitive process rather than individual competitors and allowing anticompetitive conduct to be better targeted.

This proposed legislative change has followed a series of reviews and consultation processes over the past few years, including the 'root and branch' competition policy review, and a consultation process conducted by the Treasury Department within the Australian government. Following a further round of consultation on exposure draft legislation, on 1 December 2016, the Australian government introduced the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 into Parliament. Also on 1 December 2016, the bill was referred to the Economics Legislation Committee for review, which subsequently recommended that the Bill be passed subject to one change, being the removal of a subsection that had mandatory factors relating to what would be competitive conduct and what would be anticompetitive conduct (proposed section 46(2)). Currently, the proposed section 46(2) lists mandatory factors that must be considered when determining whether conduct has the purpose, effect or likely effect of substantially lessening competition.

Key features of the current and proposed section 46(1) – excluding the mandatory factors in proposed section 46(2) – are set out in the following table.

Current law	Proposed new law
Only applies to corporations with substantial market power.	Only applies to corporations with substantial market power.
Conduct must be for one of three specific anticompetitive purposes, related to damaging an actual or potential competitor.	The conduct must have the purpose, effect or likely effect of substantially lessening competition in that or any other market.
The conduct must 'take advantage' of substantial market power.	The conduct does not need to 'take advantage' of substantial market power.
Predatory pricing and other forms of conduct are expressly prohibited in addition to the general provision.	There is a general provision only.
Authorisation is not available for section 46.	The ACCC may grant authorisation if it is satisfied either that the conduct is unlikely to substantially lessen competition or is likely to result in a net public benefit.

The ACCC released draft guidelines on the new section 46 in September 2016. The guidelines contain examples of conduct that is likely to contravene section 46, which include certain refusals to deal, predatory pricing, tying and bundling used to extend or leverage market power into another market and margin or price squeezing. The guidelines also contain examples of conduct that is unlikely to contravene section 46, which include innovation, efficient conduct designed to drive down costs, responding to price competition with matching or more competitive (but above cost) prices and responding efficiently to other forms of conduct, such as product offering and supply terms.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The ACCC receives thousands of complaints annually regarding conduct potentially in breach of Part IV of the CCA. These would include complaints relating to alleged misuse of market power under section 46 of CCA. While the ACCC would be likely to investigate some of these complaints on a confidential basis, very few cases proceed to court, and many cases settle. The section 46 cases that do proceed to a court hearing often take years to resolve. In the past five years, the ACCC has commenced a number of proceedings with section 46 allegations with limited success.

On 13 February 2014, the ACCC instituted proceedings in the Federal Court of Australia against Pfizer Australia Pty Ltd (Pfizer) for alleged misuse of market power and exclusive dealing in relation to its supply of generic atorvastatin to pharmacies. Atorvastatin is a pharmaceutical product used to lower cholesterol. The ACCC sought pecuniary penalties, declarations and costs. Prior to the expiration of Pfizer's patent, it allegedly offered pharmacies discounts if they purchased significant volumes of Pfizer's branded atorvastatin product (Lipitor) and its own generic atorvastatin, with the alleged purpose of preventing competing products from entering. The Federal Court handed down judgment on 25 February 2015 (*ACCC v Pfizer* (2015)) finding that while Pfizer had taken advantage of its market power by engaging in the alleged conduct, Pfizer's market power was no longer substantial at the time it made the alleged offers to the pharmacies in January 2012. The ACCC also failed to establish that Pfizer had the proscribed anticompetitive purpose. The ACCC appealed the decision and the appeal was heard by the Full Federal Court in November 2015. At the time of writing, the judgment is still pending.

On 4 February 2013, the ACCC instituted proceedings against Visa Inc alleging, among other things, misuse of market power in relation to payments systems to prevent competition in relation to direct currency conversion services that might otherwise be offered at point of sale or at ATMs, as well as anticompetitive exclusive dealing. The proceedings were ultimately settled on 4 September 2015, with Visa admitting a contravention of section 47 of the CCA (exclusive dealing with the likely effect of substantially lessening competition in the market in Australia for currency conversion services on the Visa network) and paying an A$18 million fine (*ACCC v Visa* (2015)). The Federal Court also ordered Visa to pay A$2 million of the ACCC's legal costs. Visa did not admit the misuse of market power allegation under section 46 and the ACCC agreed not to pursue the claim as part of the settlement.

The ACCC has settled two other section 46 cases before the substantive proceedings were heard by the Federal Court. In *ACCC v Ticketek Pty Ltd* (2011), the penalties totalled A$2.5 million, and in *ACCC v Cabcharge Australia Ltd* (2010), the penalties totalled A$14 million (including A$3 million for Cabcharge's admitted predatory pricing and A$11 million for admissions in relation to refusals to supply in breach of section 46).

In *ACCC v Cement Australia Pty Ltd & Others* (2013), which was initiated by the ACCC in 2008 and heard by the Federal Court in 2010–2011, the Court determined that Cement Australia had not breached section 46. While Justice Greenwood found that Cement Australia had market power in the South East Queensland fly ash market, he held that Cement Australia did not take advantage of its market power in entering the sourcing contracts, because another corporation in Cement Australia's position, but in a workable competitive market, could have entered into the contract on those same terms and conditions.

No new section 46 proceedings were instituted by the ACCC in 2016.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Where the court has found a contravention of section 46 or 46A, contracts entered into will not automatically lose their validity. However, the court has discretion to make ancillary orders, including that contracts entered into are void (in whole or in part) or must be varied.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private litigants can institute proceedings for a breach of section 46. Private litigants are able to seek the same remedies and orders as the ACCC can seek, except for pecuniary penalties (see questions 32 and 34). Private litigants may proceed as a class action (representative proceedings) in appropriate circumstances.

In terms of refusal to supply and refusal of access, there are clear precedents that this could constitute a misuse of market power (see *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) and *NT Power Generation Pty Ltd v Power & Water Authority* (2004)). Private litigants can, therefore, bring an action in these circumstances. Moreover, as noted above, Part IIIA provides a regime by which third parties can seek access to infrastructure owned by another.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Private litigants may claim damages for a contravention of section 46 where it causes them damage or loss pursuant to section 82 of the CCA. Actions for damages under the Act must be brought within six years of the accrual of the cause of action (section 82(2)).

Under section 87(1B), the ACCC can bring an action on behalf of people who have suffered damage or loss. Alternatively, a class action can be brought by seven or more persons that have similar claims for damages arising from a breach of section 46 (see section 33C(1) of the Federal Court of Australia Act 1976 (Cth)).

Section 82 does not provide express guidance to the court in assessing the amount of any loss or damage suffered by a company. In *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995), the High Court suggested that the rules for assessing damages in tort are the appropriate guide in most, if not in all, cases. It has also been recognised that the statutory right to damages conferred by section 82 serves a wider purpose and is intended to have a broader ambit than common law action.

As noted in question 29, the ACCC tends to settle most section 46 cases. With the judgment pending in relation to *ACCC v Pfizer*, the two most recent cases that involved settlement in relation to contraventions of section 46 are *ACCC v Ticketek Pty Ltd* (2011) and *ACCC v Cabcharge Australia Ltd* (2010). In the penalty judgment for *ACCC v Ticketek Pty Ltd* (2011), Justice Bennett stated that the agreed figure was 'meaningful and substantial, serving the objects of general and specific deterrence and serving the public interest in encouraging the cooperation of parties the subject of Part IV investigation and litigation'.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

As Australia has a judicial enforcement position, a finding of misuse of market power can only be made by the Federal Court. The Federal Court hears the matter at first instance and its determination may be appealed to the Full Federal Court on a question of law.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

As section 46 focuses on the unilateral conduct of firms with a substantial degree of market power, it is a lesser threshold than dominance and, therefore, may apply to the conduct of a firm that would not be considered dominant. Exclusive dealing prohibitions under section 47, prohibiting a firm from imposing conditions on supply or acquisition of goods or services that have an anticompetitive purpose or effect, and the per se prohibitions on third-line forcing are also unilateral in character and apply to non-dominant firms. Further, Australia's per se minimum resale price maintenance prohibition does not require proof of dominance, market power or of any agreement.

Schedule 2 of the CCA (the Australian Consumer Law (ACL)) also regulates the unilateral behaviour of all firms in relation to how they deal with consumers. The ACL prohibits unconscionable conduct, misleading and deceptive conduct, false and misleading representations, and unfair consumer contract terms.

From June 2012, unilateral private disclosure of price-related information to competitors has been prohibited, if it is not in the ordinary course of business. Unilateral disclosure of information to any person as to price, capacity to supply or commercial strategy is also prohibited where it is made for the purpose of substantially lessening competition (these are commonly known as the 'price-signalling' prohibitions). These prohibitions apply irrespective of market power and, at present, only apply to the banking sector. As noted in question 1, these provisions will be repealed.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

In Brazil, the main piece of legislation applicable to the behaviour of dominant firms is Law No. 12,529/2011 (article 36, IV), which stipulates that any act that has as its object or effect the abuse of a dominant position constitutes an antitrust infringement subject to penalties. The Administrative Council for Economic Defence (CADE), the Brazilian competition authority, has yet to issue issue specific regulation establishing a framework for assessment of dominance cases, and continues to rely on its resolutions, which were enacted under the now revoked Competition Law No. 8,884/94, especially CADE's Resolution 20/99 (Resolution 20/99).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Law No. 12,529/2011 establishes that a dominant position is presumed when a company or a group of companies is able to individually or jointly change market conditions or when it controls 20 per cent or more of the relevant market. This 'dominance presumption' is not absolute, however, as CADE must take into account market conditions (eg, barriers to entry, rivalry, customers' buying power, among others) to reach a conclusion on whether the company or group of companies indeed hold a dominant position in a specific market. Law No. 12,529/2011 also provides that the 20 per cent threshold may be subject to change by CADE for specific sectors of the economy.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Law No. 12,529/2011 refers to free enterprise, free competition, the social role of private property, consumer protection and repression to the abuse of economic power as its guiding principles. In practice, however, CADE's policy has been to enforce Law No. 12,529/2011 based mainly on economic standards, seeking to achieve efficiency and consumer welfare through the promotion of competition.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

In the telecommunications sector, the General Plan of Competition (PGMC), issued by the Brazilian telecoms regulator ANATEL stipulates the rules to determine whether an economic group holds the 'significant market power' (SMP) to influence economic conditions in certain telecommunications markets. Companies found to hold SMP may be subject to asymmetric regulatory obligations regarding transparency, access to resources, products offer and equality, as well as wholesale price control measures put in place by ANATEL. In order to determine whether an economic group holds significant market power in a relevant market, ANATEL assesses the group's market share, ability to benefit from economies of scale and scope, control over an essential facility, and presence in both wholesale and retail segments.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

According to article 31, the provisions of Law No. 12,529/2011 are applicable to individuals or entities of public or private law, as well as any associations of entities or individuals, whether de facto or de jure, even if created temporarily, incorporated or unincorporated, or engaged in business under a legal monopoly system.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Pursuant to article 36, II of Law No. 12,529/2011, any acts that have as their object or effect to dominate a market may be deemed an antitrust infringement. This means that the mere attempt to achieve a dominant position may be subject to penalties by the antitrust authority, regardless whether the attempt is successful. Article 36 paragraph 1 clarifies that achieving a dominant position by means of greater efficiency does not fall within the meaning of the said provision.

7 Collective dominance

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

There is no separate concept of collective dominance in Brazil. However, article 36, paragraph 2 of Law 12,529/2011 expressly provides that dominance can be either individual or collective, stating that it is presumed whenever 'a company or group of companies' is able to unilaterally or jointly change market conditions or when it controls 20 per cent or more of the relevant market.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

There are no differences in terms of application of the law for dominant purchasers and dominant suppliers. Although Law No. 12,529/2011 does not have an explicit rule on dominant suppliers or purchasers (in contrast to previous legislation, ie, revoked Law No. 8,884/94), it applies to these agents as well.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Pursuant to Resolution 20/99, the test used for market definition in dominance investigations is the 'hypothetical monopolist test'. This is

the same test adopted in merger control cases and defines the relevant market as the smallest group of products and geographic area in which such products are manufactured or sold, so that a monopolist company could impose a small, but substantial and not temporary price increase without consumers consuming another product or buying it in another region.

As mentioned above, Law No. 12,529/2011 provides that a dominant position is presumed when a company or a group of companies is able to unilaterally or jointly change market conditions or when it controls 20 per cent or more of the relevant market. However, this 'dominance presumption' is not absolute, and CADE must take into account market conditions to reach a conclusion on whether an undertaking or group of undertakings have market power. Accordingly, Law No. 12,529/2011 also provides that such 20 per cent threshold may be subject to change by CADE for specific sectors of the economy.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Law No. 12,529/2011 does not define abuse of dominance, but its article 36, paragraph 3, lists examples of practices that could be regarded as an abuse of dominant position, such as tying and exclusivity arrangements. Resolution No. 20/99 establishes steps to identify potential abuses: (i) definition of the relevant market; (ii) calculation of the party's market share; (iii) assessment of market conditions, including concentration levels and barriers to entry; and (iv) balancing of negative effects of the conduct on the market against its efficiencies.

Accordingly, precedents have generally followed an effects-based approach in order to identify a dominance abuse. With respect to resale price maintenance, however, CADE has been adopting a stricter approach. Following the *SKF* case, RPM agreements (especially those that prescribe minimum or fixed prices) are now scrutinised much more rigorously, albeit not under a blunt per se approach, as CADE presumes this practice to be illegal and the undertaking has the burden to prove its efficiencies.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

In theory, Law No. 12,529/2011 covers both exclusionary and exploitative practices; it prohibits any acts that have as their object or effect not only the limitation of free competition, but also the arbitrary increase in profits. In 2010, in the *Sindimiva* case, CADE had a lengthy discussion regarding the enforceability of the rule on exploitative pricing, considering the lack of reasonable criteria to examine whether the price was exploitative or not. Although a 4–3 vote held that exploitative pricing could be a stand-alone claim, to this date, CADE has not found any exploitative conduct itself to amount to an antitrust infringement.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Considering that Law No. 12,529/2011 sanctions the abuse of a dominant position, the existence of dominance must be established to justify an investigation of a company for dominance abuse. In dominance abuse investigations, CADE will deem that a dominant position is being abused if the conduct's anticompetitive effects are greater than its efficiencies, following the steps stipulated by Resolution No. 20/99. CADE may consider cases in which the anticompetitive effects did not occur in the same market in which the company is dominant, but in a downstream, upstream or neighbouring market (see the *THC2* case mentioned in question 18 for further details regarding the geographic extent of dominance). In those cases, the foreclosure effects must have occurred as a consequence of the abusive conduct of the dominant firm in the dominated market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Pursuant to Resolution No. 20/99, the analysis of abuse of a dominant position requires an examination of the actual or potential effects of the investigated conduct. Under such analysis, a defence on efficiency gains can be presented by a dominant company, which can argue, for example, that the conduct reduces transaction costs, deters free riding or protects investment in research and development. If those efficiency gains are deemed to outweigh the anticompetitive effects of the conduct, CADE will conclude there is no abuse and that the conduct is legal from a competitive perspective and Law No. 12,529/2011. Article 36 downplays intent as an element for assessing whether a conduct is lawful. Therefore, even if exclusionary intent is demonstrated, companies can still raise defences to allegations of abuse of dominance. In practice, however, CADE has not decided a case on the basis that an anticompetitive practice was justified by efficiency gains.

Specific forms of abuse

14 Rebate schemes

There is no specific provision regarding rebate schemes in Law No. 12,529/2011 or Resolution No. 20/99, although, as mentioned above, any behaviour that has the effect (actual or potential) to harm competition, including by abusing one's dominant position, may be considered an antitrust infringement. Therefore, while rebate schemes are not per se infringements, they may still be considered illegal under Law No. 12,529/2011 depending on whether they have the ability to foreclose competitors from entering the market. Accordingly, CADE's precedents have been consistent in applying the effects-based approach, acknowledging that rebate schemes can have efficiencies but they also raise anticompetitive concerns, calling for an assessment on a case-by-case basis.

One of the most relevant cases that discussed rebates was the *Ambev/Tô Contigo* case (2009). The case involved a fidelity programme called Tô Contigo created by Ambev, the leading Brazil brewery company. The programme awarded advantages to retailers that purchased Ambev products, including discounts and points that could be exchanged for prizes. In its decision, CADE acknowledged that rebate schemes may generate positive effects in the market. Nevertheless, in that case, CADE concluded that the practice's anticompetitive effects outweighed its efficiencies, stating that Ambev's market power, combined with the exclusivity requirement imposed on selected retailers and the loyalty nature of the rebates increased competitors' costs and foreclosed their access to the market, restricting competition. Therefore, CADE punished Ambev for antitrust infringement, imposing a fine of 352 million reais. Ambev challenged CADE's decision in court and, in July 2015, reached an agreement with CADE, agreeing to pay a fine of 229 million reais and terminate the investigated conduct.

15 Tying and bundling

Law No. 12,529/2011 in its article 36, paragraph 3, XVIII defines tying and bundling as conducts whereby an undertaking conditions the sale of goods or the provision of services to the acquisition or use of another good or service. Such conduct is subject to penalties. Pursuant to Resolution No. 20/1999, competition concerns arise when a dominant firm uses tying and bundling to leverage its dominance into new markets.

Precedents show that CADE examines four cumulative requisites to determine whether this kind of conduct amounts to an antitrust infringement: (i) if the tying and the tied goods are two distinct products; (ii) if there is any sort of coercion for the joint purchase of both products or services; (iii) if the seller holds a dominant position in the tying market; and, finally, (iv) if the conduct's efficiencies outweigh the anticompetitive effects.

In recent years, CADE has dismissed many investigations, determining that the conduct did not meet the above-mentioned requisites. In the *CBSS* case (2015), for example, CADE assessed tying practices in the meal vouchers market. This investigation was based on a complaint by Sodexo, a meal vouchers company, against major Brazilian banks that were allegedly offering discounts in financial transactions to

corporate customers in exchange for hiring CBSS, another local meal vouchers company affiliated to the investigated banks. According to Sodexo's complaint, this practice amounted to an anticompetitive tying arrangement. CADE did not agree with such view. According to CADE, because this was a mixed bundling (ie, consumers were offered the choice of buying the bundled products separately), the coercion criterion would only be met if the price charged for the products purchased separately was 'exorbitantly' higher than the price charged for the bundle, amounting to a de facto inducement. Given that CADE found no evidence that prices charged for the separate and bundled products were so discrepant, it decided that the arrangement did not constitute an antitrust infringement and dismissed the investigation.

16 Exclusive dealing

There is no specific provision regarding exclusivity in Law No. 12,529/2011. Nevertheless, as mentioned, any behaviour that has the effect (actual or potential) of harming competition, including by abusing one's dominant position, may be considered an antitrust infringement subject to penalties. As such, while exclusivity provisions are not per se infringements, they can amount to an infringement of Law No. 12,529/2011 if their anticompetitive effects outweigh their efficiencies. According to Resolution No. 20/99, the anticompetitive effects raised by exclusivity arrangements generally relate to the facilitation of upstream collusion and to unilateral increase of market power through foreclosing of distribution channels or input supply; efficiencies, in turn, relate to reduction of transaction costs and prevention of free riding.

In recent years, CADE has investigated a number of exclusive dealing cases, imposing penalties on several of them. Some of the cases involved Unimed, a physicians' cooperative that often required exclusivity from local physicians and hospitals for the provision of healthcare services, prohibiting them from affiliating with other healthcare plans. CADE prohibited such exclusivity arrangements on the basis that they foreclosed other healthcare plans from entering the market

17 Predatory pricing

Predatory pricing is defined by article 36, paragraph 3, XV of Law No. 12,529/2011 as a potential antitrust infringement, being defined as the sale of a product or service for a price that is below its cost. Resolution No. 20/99 further details the concept of predatory pricing, defining it as the practice of charging prices below the average variable cost, seeking to eliminate competitors in order to charge prices and yield profits that are closer to the monopolistic levels. It also establishes the possibility of recoupment of losses as a condition for finding of predatory pricing, thus expressly excluding seasonal commercial practices with no impact on competition. To date, CADE has not found any conduct to amount to an abuse of dominant based on predatory pricing.

18 Price or margin squeezes

Pursuant to Law No. 12,529/2011 in its article 36, paragraph 3, IV, the practice of margin squeeze is a potential antitrust infringement. It is defined as the imposition of difficulties on the operation or development of goods or services.

In recent years, CADE has discussed margin squeeze in a few cases. In the *VU-M* case (2014), CADE dismissed a complaint by GVT (a landline operator) whereby it accused mobile network operators (MNOs) of setting different prices to terminate calls on their own networks depending on which company originated these calls (ie, the MNO themselves or a landline operator). According to GVT, calls originated by MNOs were charged with a lower termination rate when compared with calls by landline operators and, as a result, MNOs would be favoured to the detriment of landline operators in the downstream market (ie, origination market). CADE found, however, that this conduct did not amount to a margin squeeze practice. It found that the termination rate was regulated by ANATEL, leaving no room for the MNOs to define prices and deliberately engage in margin squeeze; the MNOs did not compete with landline operators in the downstream market and even in the absence of a price regulation, there would be no rationale for the MNOs to attempt to harm landline operators by means of a margin squeeze practice.

However, in the *THC-2* case (2015), CADE fined port operators Tecon and Intermarítima 5.8 million reais for imposing abusive storage fees on customs-bonded dockside terminals in the city of Salvador (state of Bahia). In this case, Tecon and Intermarítima were charging anticompetitive fees on customs-bonded dockside terminals whenever importers decided to store their cargo in dry ports instead of Tecon and Intermarítima's own storage. Given that customs-bonded dockside terminals depended on those port operators receiving their customers' cargo and performing their storage services, CADE found that Tecon and Intermarítima held a dominant position and were able to raise their rivals' costs, squeezing their margins. CADE also fined Tecon 4.7 million reais in a similar case involving abusive fees imposed by Tecon on customs-bonded dockside terminals in the city of Porto Grande (state of Rio Grande do Sul).

19 Refusals to deal and denied access to essential facilities

Refusal to deal and denial of access to essential facilities are deemed a potential antitrust infringement, pursuant to article 36, paragraph 3, V and XI of Law No. 12,529/2011. According to Resolution No. 20/99, refusals to deal and denial of access to essential facilities can increase the barriers to entry in the market and create foreclosure effects. However, such conduct can help reduce transaction costs and avoid free riding. According to CADE's precedents, in order for such practices to be found an antitrust infringement, access to the facility must be considered essential for entrance into the market and its replication must be impossible or not reasonably feasible.

CADE has dismissed a number of refusals to deal investigations in recent years. In the *Thyssenkrupp* case (2014), for example, CADE dropped an investigation involving Thyssenkrupp, an elevator manufacturer, for its refusal to supply spare parts to independent maintenance companies and denied them access to its software to repair elevators. In its assessment, CADE found no evidence that Thyssenkrupp had been refusing access to its software and concluded that independent maintenance companies were able to find other suppliers of spare parts in the market. Therefore, CADE decided that the alleged conduct did not amount to an antitrust infringement and dismissed the case.

20 Predatory product design or a failure to disclose new technology

Predatory product design and failure to disclose new technology are covered under article 36, paragraph 3, V and XIX of Law 12,529/2011, which indicate as a potential antitrust infringement the creation of difficulty for the operation or development of competitors and the abuse of technology, brand, industrial and intellectual property rights.

CADE has recently decided two interesting cases of alleged predatory product design involving Ambev, the leading brewery company in Brazil. Much of the beer marketed in Brazil is packaged in reusable bottles. Those bottles have a standard 600ml size, which allows market players to coordinate their recycling programmes. In this regard, the first investigation concerned the introduction by Ambev of a 630ml proprietary bottle, which was similar to the standard 600ml bottle and was allegedly causing confusion in this recycling programme, raising the costs for competitors that marketed products that compete with Ambev's products. The investigation was closed in 2009 after Ambev entered into a cease-and-desist commitment with CADE, agreeing to stop using its 630ml bottles within a certain period of time.

The other investigation concerned the launching of proprietary one-litre returnable bottles by Ambev, which also allegedly harmed competitors by creating difficulty for the sharing system of returnable bottles. According to CADE, this conduct would amount to an antitrust infringement if the following criteria were met: (i) the company held a dominant position; (ii) the conduct had the potential to cause anticompetitive effects in the market; and (iii) there was no legitimate justification for the conduct. In this case, despite Ambev's dominant position, CADE understood the conduct was not able to cause anticompetitive effects because, unlike the 630ml bottles, the one-litre bottles were very different from the standard 600ml bottles and, therefore, easier for competitors to identify and return them, with no raise in costs. In addition, CADE understood the practice had a legitimate justification, having a different purpose that was beneficial to consumers. Therefore, CADE dismissed the case in 2012.

21 Price discrimination

Pursuant to article 36, paragraph 3, X, of Law No. 12,529/2011, discriminatory practices may be an antitrust infringement. According to Resolution No. 20/1999, while price discrimination can sometimes be

Update and trends

We are not aware of any amendment to the legislation or any other measure by CADE that could impact the topic of dominance in the coming years. In the past few years, the Brazilian antitrust authority has been placing greater emphasis on cartel investigations, promoting several changes to applicable legislation. Nevertheless, CADE's strategic plan for 2017–2020 indicates that it plans to 'strengthen enforcement on anticompetitive practices', which certainly includes abuse of dominance investigations.

justified if based on volume, for example, owing to economies of scale, it can also be the symptom of other potentially anticompetitive practices, such as refusal to deal and bundling. Accordingly, this practice, as all other potential antitrust infringements, must be assessed on a case-by-case basis, balancing their potential anticompetitive effects with their efficiencies.

In the *Gemini* case (2016), the assessment of discrimination practices was recently discussed. It involved an alleged price discrimination practice in the provision of natural gas by Petrobras. According to Comgás, the claimant, Petrobras was favouring the Gemini consortium (formed by Petrobras, White Martins and GasLocal) when supplying gas-to-gas distributors. According to CADE, in order for a discriminatory conduct to amount to an antitrust infringement, the following criteria must be met: (i) the company holds a dominant position; (ii) there are structural, contractual or corporate incentives for the discrimination; (iii) the discrimination has the potential or effect to harm competition; and (iv) there is no legitimate justification for the conduct. In this case, CADE found that all four requirements were present: Petrobras held a dominant position in the gas market, it had incentives to engage in discriminatory conduct because it was vertically integrated with the gas distributor Gemini. There was evidence that the market was being foreclosed owing to the alleged discrimination and defendants had no legitimate rationale for the conduct. Therefore, CADE punished Petrobras, White Martins and Gas Local with a fine of approximately 22 million reais, prohibiting them from engaging in any discriminatory practice in the marketing of gas.

22 Exploitative prices or terms of supply

Despite some controversy, Law No. 12,529/2011 is deemed to cover exploitative prices, as it expressly prohibits any act that has as its objective or effect 'the arbitrary increase in profits'. This was confirmed in the *Sindimiva/White Martins* case (2010), mentioned above, in which a 4x3 vote held that exploitative pricing could be a stand-alone claim. To this date, however, CADE has not found any exploitative conduct to amount to an antitrust infringement.

23 Abuse of administrative or government process

Sham litigation practices can amount to antitrust infringement if deemed to have the object or be able to restrain competition in the market. CADE has been dealing with a number of sham litigation cases in recent years. According to CADE's precedents, the following elements must be taken into account when assessing whether a company engaged in anticompetitive sham litigation: (i) whether the claim was credible or based on misleading information; (ii) whether the claim was baseless and there was no realistic expectation of success; or (iii) whether the means adopted by the investigated company to present its claim was not reasonable or adequate to its alleged intent. In the *Eli Lilly* case (2015), for instance, CADE understood that Eli Lilly tried to artificially maintain its position as the exclusive supplier of Gemzar, a cancer drug, by filing misleading and contradictory lawsuits with Brazilian courts and challenging the Brazilian Patent Office's refusal to grant the patent of the cancer drug. Therefore, CADE convicted Eli Lilly for anticompetitive sham litigation, imposing a fine of 36.6 million reais.

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions subject to the Brazilian merger control are addressed in article 88 of Law 12,529/2011 and can be blocked or approved with conditions by CADE if found to hinder open competition or result in in control by a company of relevant markets.

25 Other abuses

Other types of abuse may fall under article 36 of Law No. 12,529/2011 and amount to an antitrust infringement as long as they have the object or are able to produce the effects of restraining competition, dominating a relevant product or service market, arbitrarily increasing profits or abusing a dominant position.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

CADE is the agency responsible for investigating, prosecuting and ruling on abuse of dominance conduct. CADE is divided into two departments: the General Superintendency (GS) and the Administrative Tribunal (Tribunal).

The GS is responsible for initiating and conducting investigations related to infringements, adopting preventive measures to cease anticompetitive practices, negotiating and entering into agreements, and otherwise preventing and prosecuting antitrust infringements. During its investigation, the GS has broad powers, including the power to search companies' premises and to seize documents and/or other materials as it may deem necessary. Law No. 12,529 grants the GS authorities power, including the power to make dawn raids without prior notice, provided that a judicial order is issued. After concluding its investigation, the GS will issue a non-binding opinion with its findings and a recommendation to the Tribunal, which should be either to dismiss the case, or to impose penalties for infringement of the law.

Seven members, who are in charge of ruling on anticompetitive conduct cases, make up the Tribunal. At the Tribunal, a Reporting Commissioner will be appointed to issue a report and a vote on the case after hearing CADE's Attorney General, who will issue a non-binding opinion. The case will then be brought to judgment before the Tribunal at a public hearing. The Tribunal may decide to dismiss the case if it finds no clear evidence of abuse of dominance or to impose penalties and order the defendants to cease the antitrust infringement.

Law No. 12,529/2011 also creates a third body, namely the Department of Economic Studies, which acts as an advisory body for both the GS and the Tribunal in the analysis of mergers and anticompetitive conducts.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Article 37 of Law No. 12,529/2011 allows CADE to impose fines that vary from 0.1 per cent to 20 per cent of the company or group of companies' pre-tax turnover earned in the economic sector affected by the conduct in the year prior to the beginning of the investigation. The fine must be no less than the amount of harm resulting from the conduct. Directors and other executives found liable for the conduct may also be fined from 1 per cent to 20 per cent of the fine imposed on the company. So far, the highest fine imposed on a dominance case was the 352 million reais fine imposed on Ambev/Tô Contigo (2009).

CADE may also order the publication of its decision in a major Brazilian newspaper, at the defendants' expense, order structural or behavioural remedies, such as the corporate spin-off and impose any other sanctions deemed necessary to terminate the conduct's anticompetitive effects. According to article 84 of Law No. 12,529/2011, the Tribunal or the GS can adopt preventive measures (cease-and-desist orders) whenever there are reasons to believe that the defendant caused or may cause irreparable or substantial damage to the market, or when awaiting a final decision may render it ineffective.

Finally, article 85 allows CADE to enter into an agreement with the defendant, at any stage of the proceeding, whereby the defendant undertakes to cease the investigated conduct (the cease-and-desist commitment). The case is put on hold while the commitment is duly complied with. If the conditions set out in the commitment are fully met, the case is dismissed.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

According to CADE's Resolution No. 1/2012, if defendants fail to pay the fine or comply with other penalties within the term established in CADE's decision, CADE must petition a court in order to seek enforcement.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Abuse of dominance investigations are less common in Brazil in comparison to cartel investigations. According to publicly available information, in 2016 CADE opened fewer than 10 dominance investigations, and concluded the analysis of eight cases. Of those eight cases, CADE found the defendants to be guilty in five of them. CADE dismissed the other three cases given a lack of evidence against the investigated parties. Abuse of dominance proceedings usually take from one to three years until CADE reaches a final decision, but complex cases may take a little longer as they involve consultations with the market and stakeholders (eg, agencies, trade associations, among others) and further discussions on economic rationale and possible efficiencies of the investigated conduct.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

CADE has the authority to declare a contract or some of its provisions invalid if they are found to be an antitrust infringement under Law No. 12,529/2011. In this case, the contract's remaining provisions not related to the antitrust infringement, if any, remain in force.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

According to article 47 of Law No. 12,529/2011, those harmed by an antitrust infringement are allowed to seek indemnification and the cessation of the anticompetitive conduct in courts. Courts have authority to adopt any measure – including invalidating contractual clauses or ordering a firm to grant access to certain technology (eg, with the purpose of obtaining the cessation of the anticompetitive conduct). Despite this framework for private enforcement resulting from antitrust infringement, however, private actions are still relatively rare in Brazil.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Article 47 of Law No. 12,529/2011 allows those harmed by an antitrust infringement to seek indemnification and the cessation of the anticompetitive conduct in courts. This is parallel to administrative proceedings, which will not be suspended in view of the claim in court. Private compensation claims can be filed by an individual, an entity or by various entities. Consumer organisations, public prosecutors and other public bodies can initiate collective actions. Damages are assessed by the courts on a case-by-case analysis. Plaintiffs usually request the court to appoint an expert in economics to assess the competitive counterfactual price and enable damages calculation. To date, Brazilian courts have awarded only one damages case related to a cartel investigation. In this case, the judge did not consider the counterfactual price to assess damages, but rather used the average price of the product in a certain period of time. This case is still under appeal and the calculation method is deemed highly controversial. Owing to a lack of other decisions granting damages, it is still unclear how Brazilian courts would tackle this topic.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

CADE's decisions finding an abuse can be challenged only before a federal court. It is worth noting that the Brazilian Supreme Court understands that the Brazilian Constitution allows injured parties to choose in which regional federal court they want to appeal against a decision by CADE (or any other federal agency). In theory, CADE's decisions are subject to a broad review by the courts, but Brazilian courts usually adopt some level of self-restraint by only examining the formal aspects of a decision rather than its material aspects (ie, decision-making regarding correct appreciation of facts and the law).

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Yes. Article 36, II, of Law No. 12,529/2011 forbids any unilateral conduct (eg, tying, predatory price, patent abuse) that leads to dominance of a relevant market of goods or services. As mentioned, Law No. 12,529/2011 presumes dominance whenever 'a company or group of companies' is e able to unilaterally or jointly change market conditions or when it controls 20 per cent or more of the relevant market.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The relevant legislation covering the behaviour of dominant undertakings applicable in Bulgaria is the Law on Protection of Competition (LPC). The provisions prohibiting the abuse of a dominant position in the LPC mirror article 102 of the Treaty on the Functioning of the EU, excluding the requirement for effect on the trade between member states. An English version of the LPC is available on the website of the Bulgarian Competition Authority – Commission on the Protection of Competition (CPC) – www.cpc.bg/General/Legislation.aspx.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The Bulgarian LPC defines dominance as a position on the market of an undertaking that, in view of its market share, financial resources, market access possibilities, level of technology and economic relations with other undertakings, is able to act independently from its competitors, suppliers and purchasers.

In assessing dominant position, the CPC takes into account factors such as the market share of the undertaking under the investigation and of other market participants; market conditions and market structure; barriers to entry in the market; and consumers' preferences.

Bulgarian law also addresses a monopolistic position of an undertaking as an exclusive right to carry out a certain economic activity granted by law in cases explicitly provided for in the Bulgarian Constitution.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Bulgarian competition legislation aims to ensure protection of and conditions for free enterprise. The law regulates protection against the abuse of monopolistic and dominant market position that may result in prevention, restriction or distortion of competition and may affect consumers' interests. In its constant practice the Commission confirms that the LPC protects the competition on the market but not individual interests of particular undertaking. In dominance cases the CPC in recent years has increased its focus on consumers' welfare.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The competition law applies to all sectors of economy, including regulated sectors, such as telecommunications, postal services, energy and transport.

At the same time, in conformity with the 2009 EU electronic communications regulatory framework, Bulgarian Commission on Regulation of Communications (CRC) must ensure that telecoms markets are competitive. It has independent authority to review and define markets subject to ex ante regulation. The CRC defines the relevant markets and determines market players with significant market power (SMP). CRC may impose specific obligations on the SMP operators where it finds that owing to the structure of the market and the SMP position of the operator the effective competition may be prevented (ex ante regulation). Irrespective of the ex ante regulation by the CRC, the proper function of competition is subject to ex post control by the CPC.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The LPC applies to all undertakings carrying out economic activity in Bulgaria regardless of their organisational form (ie, natural or legal person or unincorporated entity) and does not provide exceptions for public or other entities. However, the conduct of a public body may be qualified as abuse of a dominant position only where the particular conduct does not represent exercise of their administrative functions and authority. For example, the Bulgarian National Health Insurance Fund has been under investigation several times for abuse of a dominant position, and only in one of the cases did the CPC find that it acted in the capacity of a commercial undertaking and assessed possible abuse of a dominant position.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Under Bulgarian law, prohibition of abuse of a dominant position only applies to undertakings that already enjoy dominance.

7 Collective dominance

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

The concept of collective dominance was reflected in Bulgarian legislation in 2008. The law prohibits any abuse of a dominant position by two or more undertakings holding a collective dominant position. The Methodology for investigation and definition of market position of undertakings on the relevant market (Methodology) adopted by the CPC, defines 'collective dominance' as a position of two or more legally independent undertakings that are linked in such a way that they adopt and apply a common market policy. In a few cases the CPC dealt with the concept of collective dominance and held that to find collective dominance it is sufficient to establish that the undertakings have given up their independent market behaviour and, given the structure of the market, collectively have market power that allows them to dictate the market conditions in a way that can gain an advantage over competitors (Decision 623/2009).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Bulgarian legislation applies to all undertakings holding and abusing a dominant position on the market. In most cases, the CPC analyses the behaviour of dominant suppliers. While there are no cases where the behaviour of dominant purchasers is assessed, we expect that the CPC will apply the law in the same manner as applied to dominant suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

In 2009, the CPC adopted a Methodology that provides guidance for defining relevant product and geographic markets. The approach of the CPC in defining the relevant product and geographic markets in dominance cases is no different from the approach used in merger control cases. The relevant product market includes all products or services regarded by the consumer as interchangeable in view of the product characteristics, price and intended use. The geographical market covers the territory on which the substitutable goods or services are offered and where the conditions of competition are homogenous and differentiate significantly from the conditions on the neighbouring markets.

Before 2008, the repealed LPC provided for a presumption for dominance where a market share of 35 per cent was present. The current LPC does not provide for a market share threshold at which an undertaking will be presumed to hold a dominant position. However, the CPC Methodology provides that if an undertaking holds a market share below 40 per cent on the relevant market it is not likely to be considered dominant. Therefore, a market share of 40 per cent could be an indication for existence of a dominant position. This threshold is often used by the CPC in dominance cases.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Bulgarian law defines the abuse of dominance as a conduct of undertaking with monopolistic or dominant position that may prevent, restrict or distort competition and may affect consumers' interests.

A non-exhaustive list of abusive behaviour is provided in the legislation. This includes the imposition of prices or unfair trading conditions; limitation of the production, trade and technical development to the detriment of consumers; applying dissimilar conditions to equivalent transactions with certain trading parties, thereby placing them at a competitive disadvantage; making the conclusion of contracts conditional upon acceptance by the other parties of obligations or conclusion of additional contracts which, by their nature or according to normal commercial practice are not independently linked the subject of the main contract or the execution thereof; unjustifiable refusal to supply any goods or provide any services to an existing or potential customer, with the purpose of hindering their business .

Under Bulgarian law, abusive practices of dominant undertakings are not per se illegal. In most of its decisions the CPC follows an effect-based approach looking for actual or potential harm to competition or consumers' interests in order to identify and sanction anticompetitive behaviour of dominant undertakings. So far in its practice the CPC has not applied the concept of 'by nature abusive behaviour', such as exclusive rebates.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Under Bulgarian law, both exclusionary practices and exploitative conduct of dominant undertakings are abusive and prohibited.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Bulgarian law prohibits abusive unilateral conduct of dominant undertakings or of an undertaking with monopolistic position. The case law of the Supreme Administrative Court (Decision 1402/2007) held that there is a causal link between a dominant position and the abusive behaviour. The conduct would be considered abusive only where it was possible because of the market power of the dominant undertaking.

According to Bulgarian law, the anticompetitive effect of the abusive behaviour of the dominant undertaking may occur in the market where such undertaking is dominant or in other markets, such as downstream or otherwise adjacent markets.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Bulgarian law does not provide explicit conditions for exclusion from liability for abusive behaviour of a dominant undertaking. In its practice the CPC accepted certain justifications raised by dominant undertakings in their defence. For instance, objective justifications like poor creditworthiness of a customer or implementation of a new commercial strategy by dominant undertakings equally applicable to all customers are considered as objective justifications for refusal to supply. In Decision 1133/2007 the CPC found that a pharmaceutical company had objective justifications of their refusal to supply their former distributors with medicines as a result of the changes in the distribution model applied by the company after the accession of Bulgaria to EU. The company decided to supply the Bulgarian market through several large distributors and made a tender with objective selection criteria (volume of sales) equally applicable to all participants. In such case the CPC also considered that the market for supplying the medicines in question was not foreclosed since the non-selected distributors had options to obtain the products from other distributors or by import.

The efficiencies defence is generally accepted by the Bulgarian competition authority. The efficiency gains are usually raised by dominant undertakings in their defence in 'abusive pricing' cases. However, in most cases the CPC rejects the defence arguments based on the failure to provide sufficient evidence for efficiencies gains for consumers.

Specific forms of abuse

14 Rebate schemes

Although the CPC considers rebate schemes that tend to foreclose competition are abusive if applied by dominant undertakings, there are a limited number of cases where the loyalty rebate scheme was assessed for compatibility with Bulgarian antitrust provisions (for example, CPC Decision No. 28/2000). CPC felt short of categorising the rebates (it found elements of 'loyalty rebates', 'exclusive dealing', 'target rebates') and focused its analysis on the foreclosing effect of the discount scheme implemented by the dominant undertaking.

15 Tying and bundling

Under Bulgarian law, making the conclusion of contracts subject obligations that have no direct pertinence to the subject of such contracts could constitute abuse of a dominant position. Neither tying nor bundling are prohibited per se by LPC.

In the assessment of tying and bundling as forms of abusive behaviour, the CPC follows EC and ECJ case law – in its Decision 839/2010 it outlines the elements that are relevant for establishing of an infringement: dominance in the tying market; tied offering of two distinct products or services; compulsion for buying the tied product; and lack of objective justifications for the applied practice. In the said decision, the CPC assessed the market behaviour of a Bulgarian cable TV operator for alleged abuse of market position on the cable TV market by way of tying services – the service 'cable TV', where the operator was said to have a dominant position was bound with a 'fixed telephony' – where it had small market share. The CPC analysis, however, did not prove

the statements of the claimant that the cable operator held a dominant position on the cable TV market and the CPC closed the case.

Bulgarian case law on tying and bundling mainly concerns telecoms markets.

16 Exclusive dealing

There is no precedent in the CPC practice, although the exclusive dealing is recognised by the CPC as a form of an abusive behaviour (CPC Decision 28/2000).

17 Predatory pricing

The CPC has rarely applied complex analyses on various cost measures in the assessment of alleged predatory pricing, although there are few examples of such cases. In Decision No. 88/2005 (quashed by the Supreme Administrative Court) the CPC fined a dominant manufacturer of bread for placing on the market products at prices below their marginal costs. The CPC found that this was abusive because it aimed to exclude competitors from the relevant market. In its practice, the CPC did not consider recoupment as a necessary element of the predatory pricing.

18 Price or margin squeezes

In Bulgarian case law (Decision 210/2006, Decision 135/2006), margin squeeze is recognised as a form of abuse of dominance where a dominant undertaking is vertically integrated and is dominant in the upstream market, so downstream competitors rely on upon the input from upstream market; set a margin between its downstream retail price and upstream wholesale price that cannot cover downstream costs; and is significantly active on the downstream market.

19 Refusals to deal and denied access to essential facilities

Under Bulgarian law, unjustified refusal to supply goods or provide services to actual or potential clients is explicitly listed as abusive behaviour. In its practice, the CPC considers as abusive the practices applied by undertakings operating essential facility without economic justification such as refusals to supply to existing and potential clients; termination (even partially) of long-standing relationships; and delay to entering into commercial relationship.

The concept of 'essential facility' has been applied by the CPC for more than 18 years. 'Essential facility' is defined in Bulgarian case law as a facility owned by a dominant undertaking that cannot be efficiently duplicated (such as a bus station; an incineration facility; telecommunication infrastructure of the incumbent operator, electricity grid), without access to which other undertakings cannot provide goods and services to their clients.

In a number of cases the competition authority and the Supreme Administrative Court held that refusal to grant access to an essential facility constitutes an abuse of dominance.

The latest sanction imposed by the CPC for refused access to the essential facility (electricity grid) was in 2015 and amounted to 14 million leva.

20 Predatory product design or a failure to disclose new technology

There have been no precedents on predatory product design or failure to disclose new technology under Bulgarian law.

21 Price discrimination

Under Bulgarian law, both price and non-price discrimination are regarded as an abusive behaviour. The law prohibits a dominant undertaking to apply dissimilar conditions to equivalent transactions to certain trading partners, thereby placing them at a competitive disadvantage.

The CPC regularly reviews cases for price discrimination. For instance, in 2015 the CPC fined an undertaking with dominant position on the market for distribution of individual heat cost allocators for applying dissimilar pricing conditions to its customers living in one city in comparison with prices applicable to consumers in other cities where the dominant company provided similar services.

In 2015, a new prohibition on 'abuse of superior bargaining position' (SBP) was provided for in the LPC. Any action or omission of an undertaking with an SBP as regards the contractor in the course of negotiations, such as imposing unfairly harsh or discriminatory conditions, unjustifiable termination of trading relationships, and which action or omission damages, or could damage, the interests of the weaker bargaining party and consumers, is prohibited. Unlike with the dominant position that takes a view on the position of the undertakings on the market, the SBP is determined in the context of a particular legal relationship between undertakings and with a view on the level of dependency between those undertakings resulting from the market structure, the character of their business activity, and the existence of alternative channels of supply.

22 Exploitative prices or terms of supply

Pursuant to Bulgarian law, imposition of purchase or sale prices or other unfair trading conditions constitute a form of abuse if committed by a dominant undertaking. The majority of CPC dominance cases in recent years relates to the imposition of exploitative (excessive) prices and unfair terms of trading by companies in the energy and telecom sector that operate essential facilities.

For example, in 2015 three operators of electricity distribution networks were fined for unjustifiably imposing excessive prices on access to the electricity distribution network. The CPC found that the dominant undertakings included in their prices certain expenses not related to the particular service for access to the electricity grid.

In 2014, a fine of approximately €14 million was imposed on the state-owned gas supplier Bulgargas for imposing unfair trading conditions to gas suppliers by forcing them to extend the terms of supply contracts without granting any option to renegotiate the contractual terms. (The CPC decision was overruled by the Supreme Administrative Court.)

23 Abuse of administrative or government process

There is a very limited number of cases where the CPC investigated enforcement of intellectual property rights as a form of abusive behaviour. For example, the CPC found an infringement where a company banned the use of a figurative trademark 'green point' in order to exclude its competitor from the market (the CPC decision was overruled by the Supreme Administrative Court).

There are few cases where the registration of IP rights in breach of respective IP procedures and excessive enforcement of such rights was considered a form of unfair competition. However, in such proceedings the market position of undertakings exercising their rights is irrelevant and the abusive behaviour has been assessed in the context of unfair competition practices that constitute a separate form of infringement under Bulgarian law.

24 Mergers and acquisitions as exclusionary practices

There are no precedents in the CPC case law of mergers and acquisitions being considered as exclusionary practices.

25 Other abuses

There is no precedent in the CPC practice.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The CPC has the authority to conduct investigations where reasonable grounds indicating possible abuse of a dominant position exist. The CPC is the sole Bulgarian authority responsible for enforcing competition laws across all sectors. As mentioned in question 4, the CRC has certain powers with regard to ex ante regulation in the electronic communications markets. Although the CRC exercises ex ante control on competition in e-communication sector, this does not preclude the CPC enforces its competences into these markets ex post if breach exists irrespective of ex ante regulation.

The CPC has a wide range of investigative powers. During an investigation the CPC case handlers are authorised to request information and evidence from the defendant, any third party, state authority or other competition authorities of the EU and member states that might have information relevant to the investigation. Requested

parties should cooperate and provide all data in their possession, even if the information contains trade secrets. The CPC is obliged to protect any confidential information and not to disclose it to other parties. The CPC may fine any person who, without reasonable grounds, fails to comply with a formal information request.

The case handlers are also entitled to take oral or written statements from representatives of undertakings and other persons, as well as to conduct inspections of premises of undertakings.

For carrying out a dawn raid at the premises of the investigated undertaking, the CPC shall obtain an explicit authorisation from the Administrative Court in Sofia, based on which, it may enter all business premises used by the investigated undertakings (offices, motor vehicles, etc). However, under Bulgarian law, private premises and vehicles cannot be inspected by the CPC.

The CPC case handlers and other persons (such as IT experts) engaged by the CPC are authorised to:

- enter and search premises. During the unannounced inspections, the CPC case handlers are usually assisted by the police in entering the premises;
- take possession of relevant documents (in copy or original documents), or take necessary steps to preserve or prevent interference with such documents;
- require any person to provide explanations to documents or information, to the best of their knowledge;
- require relevant information that is stored electronically and is accessible from the secured premises to be produced in a form that is legible and to be taken by the CPC for further analysis; and
- access servers accessible by computers and other means, located in the premises and take forensic images of any digitally stored information.

Unlike the EC, the CPC may seize all information and evidence, not only evidence relating to the investigation in question, but all other documents or evidence that raise a well-founded suspicion of other infringement under Bulgarian or EU competition laws.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Under the LPC, for abuse of a dominant position the CPC can impose administrative (pecuniary) sanctions at amount up to 10 per cent of the total turnover of that undertaking in the preceding financial year. The exact amount of sanctions is determined by the gravity and duration of the infringement, as well as the circumstances mitigating or aggravating the liability of the undertaking. The CPC has issued a Methodology on setting fines where detailed guidance is provided on calculation of fines for a particular type of infringement.

The CPC can also impose administrative sanctions to individuals who have assisted the commitment of infringements at the amount of up to €25,000.

The highest fine imposed by the CPC for abusive behaviour of a dominant undertaking was approximately €14 million – to Bulgargas (see question 22).

The CPC is also entitled to impose appropriate structural or behavioural measures to restore competition. In practice, after receiving a statement of objections, dominant undertakings may offer the CPC commitments to remedy the established anticompetitive behaviour. One recent example is the commitment approved by the CPC where the dominant electricity end supplier proposed to enter into a power-purchase agreement with its competitor, thus remedying its unjustified refusal to enter into contractual relations.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The CPC has the authority to conduct investigations and impose sanctions directly to undertakings that have abused their dominant position without additional sanction by a court. However, the CPC decisions are subject to appeal before the Supreme Administrative Court, which confirms, quashes or reduces the amount of sanctions imposed to the undertakings by the CPC.

Update and trends

New members of the CPC were appointed in July 2016. The new CPC declared the intention to focus on suspected cartels and abusive behaviour of companies operating in the motor fuel sector and pharma markets.

The upcoming implementation of the Private Damages Directive into local legislation is expected to facilitate and promote private redress for damages suffered by abusive behaviour of a dominant undertaking.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The CPC has developed extensive practice in dominance cases. Between 12 and 20 dominance cases are investigated each year. In 2016, for example, 15 new dominance cases were initiated. In the same period, the CPC found abuse of a dominant position and imposed pecuniary sanctions in two cases, and in one case adopted a commitments decision.

The most frequent forms of abusive behaviour investigated by the CPC concerns unjustified refusal to supply and imposition of excessive prices and other unfair trading conditions. The most common infringements sanctioned by the CPC are cases where unfair trading conditions were found to be imposed: applying dissimilar conditions to equivalent transactions and refusal to supply. In recent years, after being served with statement of objections by the CPC, most of the companies accused of abusive behaviour submitted proposals for remedies.

Under Bulgarian law, there is no deadline for completion of investigation in antitrust cases. The investigation by the competition authority may take at least six months, depending on the complexity of the case. The appeal proceedings last about two years in each instance.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Unlike cartels, there is no express provision in the LPC regarding the impact of an inconsistent clause in a contract involving dominant company and the consequence with respect to the validity of the contract. In such cases general provisions of the Bulgarian Contracts and Obligations Act shall apply – agreements that contradict or circumvent the law are null and void. However, if a particular clause is null and void but could be replaced by imperative provisions of law, the entire agreement shall not be affected.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Under Bulgarian law the concept for private enforcement is not yet well developed. While undertakings and individuals who have suffered damages from anticompetitive behaviour of dominant undertakings are entitled to bring an action for compensations before the civil courts, the authority of courts to establish dominance is still disputable.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

The LPC provides that private damages claims are available to all individuals and legal entities who have suffered damages even where the infringement has not been directed against them.

Pursuant to Bulgarian law, claims for damages should be brought before the competent civil courts.

A CPC decision establishing an infringement of the LPC that has not been appealed or has been upheld by the Supreme Administrative

Court is binding on the civil courts as regards the established infringement. In such cases, the claimant should prove in the court proceedings the actual damage, causation link between the damages and the particular anticompetitive behaviour, and the amount of damages.

If the claimant brings an action for damages directly before the civil courts, he or she should be able to prove that a dominant undertaking has infringed the LPC, prove actual damages, a causation link between the tort and damages suffered, and the amount of damages.

So far there have been a limited number of private damages cases brought before the courts.

At the date of this report, a bill for amendments to the LPC implementing the Private Damages Directive in the national law has been submitted to the Bulgarian parliament. It is expected the bill will be adopted in 2017.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The CPC decisions are subject to appeal before the Supreme Administrative Court (SAC). The court, when acting as a first instance is entitled to review all the facts and law. Acting as a cassation jurisdiction, the court is limited in its review of the considerations raised by the claimant.

Appeal against a CPC decision should be filed within 14 days of receiving notification of the CPC decision. Any interested third party is also entitled to appeal the decision within 14 days of its publication on the CPC website. The appeal should be submitted through the CPC. The entire CPC file is provided to the SAC. The evidence and information marked as confidential are kept in separate files to which only the judges have access. The appellant, the CPC and the interested parties may submit written statements on the appeal and are summoned to take part in oral hearings before the court. The court may appoint external experts on specific technical or financial issues. Usually, the appeal procedure takes two years.

The SAC judgment is subject to cassation before the SAC sitting in a panel of five judges. The SAC's five-panel judgment is final and binding. The cassation usually takes two years.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

As mentioned in question 21, from 2015 abuse of an SBP has been considered an infringement under the LPC and applies to a unilateral behaviour of non-dominant undertakings. The law prohibits any action or omission of an undertaking with an SBP as regards the contractor in the course of negotiations, such as imposing unfairly harsh or discriminatory conditions, unjustifiable termination of trading relationships, and which action or omission damages or could damage the interests of the weaker bargaining party and consumers. Unlike a dominant position, the SBP is determined not as a position of the undertaking on the market, but in the context of a particular legal relationship and with a view of the level of dependency between the undertakings concerned in the market structure, the character of their business activity, and the existence of alternative channels of supply.

For abuse of an SBP the CPC may impose a pecuniary sanction at an amount of up to 10 per cent of the undertaking's turnover generated during the last financial year from the sale of the goods or services concerned. The amount of such pecuniary sanction cannot be less than 10,000 leva and a cap of 50,000 leva is established if the infringer did not generate any turnover in the preceding financial year.

Unlike in the antitrust investigations, under SBP investigations undertakings are not provided with a statement of objections and have no options to remedy their behaviour.

In 2016 the CPC issued its first decision abuse of SBP prohibition – Siemens Bulgaria was found to be in SBP as regards another undertaking requesting supply of Siemens-branded spare parts required under a public procurement tender awarded to the claimant. Siemens was found to have SBP in the particular case owing to the tender requirement for supply exclusively of Siemens equipment. For delaying negotiations on the supply of the requested goods, Siemens Bulgaria was found to have abused its SBP.

The CPC is also entitled to impose a pecuniary sanction of up to 10 per cent of annual turnover on a non-dominant undertaking that sells significant quantities of goods or services over an extended period of time at prices below their production and marketing cost with the intention of unfairly soliciting clients (unfair solicitation of clients is a form of unfair competition).

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The Competition Act, RSC 1985, c. C-34, as amended (the Act) is the primary legislation that governs the behaviour of dominant firms in Canada. Section 78 provides an illustrative list of the types of practices that may qualify as abusive and section 79(1) of the Act defines the constituent elements of abuse of dominance, each of which must be established for the conduct to be prohibited and for a remedy to be granted.

The Act is administered and enforced by the Competition Bureau (the Bureau), headed by the Commissioner of Competition (the Commissioner). Final interpretation of the law is the responsibility of the Competition Tribunal (the Tribunal) and the courts.

In 2012 the Bureau issued Enforcement Guidelines on the Abuse of Dominance Provisions (sections 78 and 79 of the Competition Act) (the Guidelines), describing its approach to the interpretation of the statutory provisions in light of case law.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The statutory criteria for dominance are set out in section 79(1)(a) of the Act, which requires a finding that 'one or more persons substantially or completely control, throughout Canada or any area thereof a class or species of business'. Whether this statutory test is met turns on the definition of the relevant market and an assessment of the firm's ability to exercise market power in that market.

As directly measuring market power may be difficult, the Tribunal will examine a number of factors such as market share, barriers to entry, reduction in non-price dimensions of competition (eg, quality, choice, variety), as well as countervailing power from customers or suppliers, and the competitive impact of technological change.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The stated purpose of the Act is 'to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets'. Simultaneously, the Act aims to 'recognise the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices'. In *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748, the Supreme Court of Canada described the aims of the Act as more 'economic' than strictly 'legal'.

Prior to the introduction of the current abuse of dominance provision into the Act, abuse of dominance was a criminal monopolisation offence that required proof of public detriment. However, it was recognised that public detriment did not equate with reduced competition and the criminal provision was subsequently removed and replaced with a civil provision.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

No sector-specific dominance rules presently exist.

Historically, the Bureau published abuse of dominance enforcement guidelines for three specific sectors: the airline industry, the grocery sector and the telecommunications industry. However, the most recent Guidelines explicitly replace those sector-specific guidelines.

That said, the Bureau's Intellectual Property Enforcement Guidelines, discussed in question 23, include specific comments and examples focused on particular industries, including pharmaceuticals and software.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Other than activities generally not subject to the Act, no entities are exempt from the dominance rules.

Although the dominance rules generally apply in respect of acts directed against competitors, recent case law (eg, *Canada (Commissioner of Competition) v Toronto Real Estate Board* 2014 FCA 29 [TREB]) suggests that acts by entities that do not per se compete in the relevant market but nonetheless have the ability to influence market participants through their regulatory, quasi-regulatory or licensing powers, may also by caught by the abuse of dominance rules.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

In contrast to the US, there is no concept of attempted monopolisation in Canada. The existence of market power at the time anticompetitive conduct is engaged in is implicit in the formulation of the statutory test, and would prohibit an application to the Tribunal on the basis of anticipated market power. The Guidelines nonetheless suggest that the Bureau may investigate the conduct of a firm that does not presently hold market power but that is expected to acquire it as a result of the allegedly anticompetitive conduct, 'within a reasonable period of time'. However, the Guidelines are not binding on either the Tribunal or the Commissioner.

See question 9 for more details.

7 Collective dominance

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

Collective or joint dominance is explicitly contemplated by the Act. The words 'one or more persons' in section 79(1)(a) suggest that a group of firms may possess market power even if no single member

of the group holds market power on its own. The Bureau's analytical framework in the case of joint dominance involves an assessment of whether those firms that are alleged to be engaged in a practice of anti-competitive acts jointly control a class or species of business such that they hold market power together.

According to the Guidelines, similar or parallel conduct by firms is insufficient, on its own, for the Bureau to consider those firms to be jointly dominant. Firms may engage in certain similar, pro-competitive practices (eg, matching price reductions) without triggering the abuse of dominance provisions.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The legislation applies equally to dominant suppliers and dominant purchasers and in recent remarks, the Commissioner has confirmed that the use of buyer power can be considered an abuse of dominance, provided there is evidence of the buyer's power to influence price and the other required elements of an abuse of dominance are established.

Historically 'buyer power' has not been a significant focus of enforcement under the Act. One notable exception is a recent investigation in the grocery sector, which has focused on a large retailer's pricing strategies and programmes in the context of its relationship with its suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Market definition

Market definition focuses conceptually on the existence of substitutes for the product and geographical territory in question. It is usually determined on the basis of a 'hypothetical monopolist' test that looks at the smallest market in which a 'small but significant and non-transitory increase in price' could be profitably imposed, beginning with the product of the firm in question and the area in which it operates and expanding the relevant market to include other products or supplier locations likely to be substituted.

This approach is generally consistent with the approach taken by the Bureau in defining markets for purposes of merger analysis.

In addition to considering actual price and supply data, the Bureau may take into account a range of other factors, including consumer behaviour, past product or location substitution, product functional interchangeability, unique product characteristics, transportation costs and shipping patterns, switching costs, the role of distant sellers and foreign competition, and past price correlation among substitute products.

Market share-based dominance thresholds

While the Act does not contain 'safe harbour' market share thresholds, according to the Guidelines:

- *A market share of less than 35 per cent will generally not prompt further examination.*
- *A market share between 35 and 50 per cent will generally only prompt further examination if it appears the firm is likely to increase its market share through the alleged anticompetitive conduct within a reasonable period of time.*
- *A market share of 50 per cent or more will generally prompt further examination.*

In the case of joint dominance, a combined market share equal to or exceeding 65 per cent will generally prompt further examination.

The Tribunal has held that where market share is 80 per cent or greater, it will look for 'extenuating circumstances' and 'generally, ease of entry' to outweigh a prima facie finding of market power. In practice, all contested abuse of dominance cases have involved firms with market shares of between 80 and 100 per cent. There has not been a contested joint dominance case in Canada to date.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Both the effect on the market and the type of conduct involved determine whether a practice is considered abusive. Specifically, the Tribunal will only make an order if, in addition to the finding of dominance (see questions 2 and 9 for more details), the dominant firm or firms have engaged in or are engaging in a practice of anticompetitive acts, and the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

Practice of anticompetitive acts

Section 78 of the Act contains a list of anticompetitive acts that would be caught under the abuse provisions. The list in non-exhaustive and in practice, the abuse of dominance provisions can apply to a wide range of anticompetitive conduct.

In order to be considered 'anticompetitive', an act must be exclusionary, disciplinary or predatory towards a competitor in its purpose or reasonably foreseeable effect. This may be proven directly by evidence of subjective intent, or inferred from the reasonably foreseeable consequences of the conduct.

Certain acts not specifically directed at competitors could still be considered to have an anticompetitive purpose (see question 5 for more details).

A 'practice' of anticompetitive acts under the abuse provisions generally requires more than a single act but could be met by a single act that has an ongoing or systemic effect or a lasting impact in a market. A practice may also consist of different forms of anticompetitive conduct, not only repeated use of the same conduct.

Substantial lessening or prevention of competition

The test for establishing the practice's effect on the market is the so-called 'but for' test: , 'but for the impugned conduct, would there likely be substantially greater competition (including in terms of lower consumer prices, substantially greater product selection, quality, innovation or more frequent switching) in the market in the past, present, or future'.

Effectively, this criterion requires a consideration of the actual economic effects of the impugned conduct.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes, the concept of abuse covers both exploitative and exclusionary practices as long as they have the requisite exclusionary, disciplinary or predatory effect on a competitor and lead to a substantial prevention or lessening of competition in the relevant market (see question 10 for more detail; see 'Specific forms of abuse' for examples of specific forms of practices).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

While there is no explicit requirement that a causal link between dominance and abuse be proven, all three elements of the abuse of dominance must be established for the Tribunal to grant a remedy.

Where a dominant company engages in conduct in a market adjacent to the dominated market, that conduct cannot be abusive unless the company is also found dominant in that adjacent market. That said, 'dominance' is not necessarily restricted to firms that compete directly in the relevant market and in some circumstances may include firms that have an ability to indirectly influence participants or competition in the market, or both. Further to the *TREB* case, in principle a firm that does not compete directly in the adjacent market could nonetheless be found to be dominant in such market.

See questions 5, 9 and 10 for more details.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

There is no efficiency defence to an allegation of abuse of dominance. The Tribunal may, however, consider whether any prevention or lessening of competition is attributable to the superior competitive performance of the dominant firm (eg, owing to economies of scope or scale, lower costs, innovation).

In addition, valid business justifications, although not a defence, can be adduced to rebut evidence that the purpose of the conduct in question is anticompetitive. To be valid, business justification must have a credible efficiency or pro-competitive rationale (eg, reducing costs of production or operation, improving technology or production processes, improving product quality or service), and must relate to and counterbalance the anticompetitive effects or subjective intent of the acts. Improved consumer welfare is not, on its own, sufficient to establish a valid business justification; nor is mere self-interest.

Specific forms of abuse

14 Rebate schemes

Rebate schemes are not expressly identified as a form of potentially abusive conduct under the Act, but according to the Guidelines discounts or rebates may be an implicit form of predatory conduct (see question 17).

15 Tying and bundling

Tying and bundling are not specifically identified under the abuse of dominance provisions of the Act, although the Guidelines reference these as activities that increase customer switching costs, or in general, as potentially exclusionary abuses.

Tied selling is also addressed in section 77 of the Act, as a 'reviewable' practice separate from the abuse of dominance provisions (see question 34 for more details on reviewable practices that do not require that dominance be established).

16 Exclusive dealing

Exclusive dealing may be a form of anticompetitive act for the purpose of an abuse of dominance. For example, section 78 of the Act includes, among other potentially anticompetitive acts, requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market.

A number of abuse of dominance cases have involved exclusivity arrangements imposed by suppliers on customers (see, for example, *Canada (Director of Investigation and Research), Competition Act v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp Trib) and *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233).

Exclusive dealing is also addressed in section 77 of the Act, as a 'reviewable' practice separate from the abuse of dominance provisions (see question 34 for more details on reviewable practices that do not require that dominance be established).

17 Predatory pricing

Section 78 of the Act enumerates several examples of discriminatory or predatory conduct for the purpose of abuse of dominance, including freight equalisation, introducing fighting brands selectively and temporarily, buying up product to prevent price erosion, and selling articles below acquisition cost.

Recoupment is a necessary element. The Bureau will assess whether the predatory price is sufficient to cover the average avoidable (ie, variable) costs of providing a good or service, taking into account whether competitors could match the price without incurring a loss, and whether an allegedly predatory price is being offered to meet competition.

18 Price or margin squeezes

Price squeezing is an enumerated anticompetitive act under section 78(1)(a) of the Act. Specifically, this involves squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market.

19 Refusals to deal and denied access to essential facilities

Denied access to essential facilities is an enumerated anticompetitive act under section 78(1)(e) of the Act. Specifically, this involves the preemption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market.

Where scarce facilities or resources are legitimately used for one's own business operations, this generally will not be considered an anticompetitive act.

Refusal to deal may, in principle, constitute an 'anticompetitive act' for the purpose of the dominance provisions. However, as refusal to deal is specifically addressed in section 75 of the Act, as a separate 'reviewable' practice, the Bureau is more likely to pursue this type of conduct under that section, rather than as abuse of dominance (see question 34 for more details on reviewable practices that do not require that dominance be established).

20 Predatory product design or a failure to disclose new technology

Predatory product design is an enumerated anticompetitive act under section 78(1)(g) of the Act. Specifically, this involves the adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent entry into, or to eliminate that person from the market.

21 Price discrimination

There are not currently any price discrimination laws that apply outside the context of the Act. Until 2009, the Act contained a per se criminal prohibition on price discrimination, geographic price discrimination and discriminatory promotional allowances. In 2009 these provisions were repealed. However, this conduct remains subject to review under the abuse of dominance provisions where the conditions of section 79 are met. (See also question 17 for enumerated examples of discriminatory or predatory conduct under the Act.)

22 Exploitative prices or terms of supply

See question 11.

23 Abuse of administrative or government process

The abuse of dominance provisions of the Act do not explicitly contemplate abuse of administrative or government processes as potential forms of abuse.

That said, the Bureau's Intellectual Property Enforcement Guidelines (IPEGS) outline the Bureau's approach to dealing with competition issues involving intellectual property, including potential abuse of dominance through industry-specific conduct such as 'product switching' (or 'product hopping') and patent litigation settlements. The IPEGs reflect a sharper focus on potential concerns associated with market power in particular in the pharmaceutical industry.

Additionally, the Guidelines state that considerations such as tariffs, quotas, regulatory impediments, anti-dumping complaints or duties, government procurement policies, intellectual property laws, exchange rate fluctuations, and international product standardisation may be relevant to the Bureau's examination of the influence of foreign-based suppliers. While not necessarily forms of abuse themselves, these factors may be relevant when examining foreign competition, which is one of various 'qualitative factors' that may be taken into consideration for the purpose of identifying the relevant geographic markets in abuse cases.

24 Mergers and acquisitions as exclusionary practices

An acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier and vice versa is an enumerated anticompetitive act under section 78(1)(b) of the Act.

In addition, acquisitions of competitors have been identified by the Tribunal as acts constituting an anticompetitive practice.

25 Other abuses

As the list of anticompetitive acts in section 78 of the Act is not exhaustive, a number of additional practices such as the following could potentially be caught under the abuse of dominance provisions, provided other statutory criteria set out in section 79(1) are met:

Update and trends

Several developments in the past few years are in keeping with the Bureau's increasingly active approach to enforcement of the abuse of dominance provisions. In April 2016, the Tribunal ruled in the long-running real estate case involving TREB that an abuse of dominance had in fact been established (see question 29). Separately, the Bureau secured landmark AMPs in the two related cases involving the water heater rental industry, in which it has also highlighted its heightened focus on corporate compliance programmes (see question 27). The Bureau has maintained an active investigation agenda, including through continuation of its investigation into the practices of the largest food retailer in Canada (see question 29). It has also released updated guidance on the interface of intellectual property and competition law (see question 23), that underlines its growing attention on the innovative and expanding pharmaceutical industry. Finally, a recent internal restructuring at the Bureau formalises a move towards increased collaboration within its own organisation, as it looks towards enhanced cooperation with its international counterparts.

- publication of price lists and/or advance announcements of planned price increases;
- delivered pricing;
- certain contractual vertical arrangements such as various exclusivity requirements and related terms intended to discourage dealing with other parties (eg, automatic renewal or 'evergreen' clauses, imposition of switching costs and early termination penalties), and terms that reference competitors (eg, meet-or-release and 'most-favoured nation' clauses);
- broad non-compete clauses; and
- strategic use of actual or threatened litigation against customers or (potential or actual) competitors.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Responsibility for the enforcement of the dominance rules under the Act falls primarily to the Commissioner, and those to whom the Commissioner delegates responsibilities (ie, the Bureau). The Bureau is empowered to conduct inquiries into potential abuse of dominance behaviour and bring applications before the Tribunal for remedies, subject to various statutory procedural limitations.

During an inquiry, the Bureau has access to a number of formal investigatory tools including the ability to obtain a judicial order under section 11 of the Act to compel oral examination, document production, or a written response to questions, where the Bureau believes grounds may exist for an order. The Bureau has increasingly made use of this tool to compel production in recent years. The Bureau can also obtain a warrant to enter and search premises and seize documents, or in 'exigent' circumstances, exercise these rights without a warrant.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Violations of the abuse of dominance provisions are subject to prohibition orders and administrative monetary penalties (AMPs).

The Tribunal may issue an order prohibiting the continuation of an impugned practice and in addition, or as an alternative, also has broad discretion to make any other order, where a prohibition order alone is not likely to be sufficient to restore competition in the market.

The Tribunal's authority to make a restorative order explicitly extends to an order to divest assets or shares, although to date divestiture has never been ordered under section 79 and orders have been limited to behavioural remedies.

The Tribunal may also impose AMPs of up to C$10 million in the first instance or C$15 million for a subsequent order. Pursuant to section 79(3.2) of the Act, the Tribunal is required to consider various factors in determining the amount of an AMP, including the affected sales, actual or anticipated profits, the dominant firm's financial position, its history of compliance and 'any other relevant factor'. An unpaid AMP is a debt owed to the Crown and recoverable in any court of competent jurisdiction.

Where an inquiry is ongoing, under certain circumstances the Tribunal may issue an interim order (on application by the Bureau on an ex parte basis) prohibiting conduct that could be subject to an order under the abuse of dominance provisions.

The Bureau sought maximum AMPs of C$10 million and C$15 million, respectively, in recent enforcement actions against two Ontario companies in the residential market for rental water heaters and related services. The two companies ultimately entered into consent agreements with the Bureau and agreed to pay an AMP of C$5 million (plus C$500,000 to the Bureau's investigation costs) and C$1 million, respectively. The maximum AMPs sought and the penalties ultimately imposed – the first for abuse of dominance in Canada – represent unprecedented remedies in a Canadian abuse of dominance case.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Bureau cannot impose sanctions directly and must apply to the Tribunal for an order.

It is increasingly common for alleged abuses of dominance to be investigated and initially challenged outside the formal Tribunal process with a view to seeking a negotiated resolution. Negotiated settlements are then recorded in a 'consent agreement', which is then registered with the Tribunal and, once registered, carries the legal force of an order of the Tribunal.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The Bureau does not publish up-to-date statistics on the number of abuse of dominance investigations commenced or discontinued. However, abuse of dominance ranks very high among Bureau's enforcement priorities and the abuse of dominance provisions are vigorously enforced.

In recent cases, the forms of abuse which have been prosecuted have varied. For example, *TREB* dealt with a restriction by the Toronto Real Estate Board of members' access to multiple listing service information. Recent cases involving residential water heaters involved alleged 'aggressive retention tactics' during customer calls, as well as other policies and procedures aimed at hindering switching to competitors. A case in the pharmaceutical sector involved alleged 'product hopping' through intentional disruption of the supply of a branded prescription anti-allergy drug in order to limit or prevent meaningful competition from generic drug companies. In the medical devices sector, a recent case involved the imposition of warranty terms relating to one company's insulin pumps with other companies' equipment, which allegedly limited competition and restricted consumer choice. A recent case involving an online search engine/advertiser dealt with alleged conduct intended to exclude or disadvantage competitors, including through the imposition of conditions and demands on customers preventing rivals from competing. The Bureau's ongoing investigation in the grocery sector targets a large grocery retailer's pricing strategies and programmes in the context of its relationship with its suppliers. A recently completed investigation focused on a device manufacturer's agreements with Canadian wireless carriers.

Based on these recent cases, abuse of dominance cases generally may last between two and five years, from the Bureau's initiation of an investigation or filing of an application with the Tribunal, to an order of the Tribunal or registration of a consent agreement. It is not uncommon for the Bureau to initiate an investigation that lasts two or more years before the Bureau makes an application to the Tribunal or discontinues the investigation.

In 2015, following a successful appeal by the Commissioner, the Tribunal reheard a long-running case involving TREB that concerned one of the prevailing tests for finding that an abuse of dominance has occurred. The case involved restrictions on TREB members' provision of direct access to multiple listing service information such as sales inventory, selling price and broker compensation, which the Bureau argued prevented the introduction of internet-based services such as

'virtual office websites' through which such information could be made available at low cost. In its original decision in 2013, the Tribunal found on the facts that TREB does not compete with its members, and therefore could not satisfy this test. However, on appeal, the Federal Court of Appeal held that the abuse of dominance provisions could apply on the basis that TREB controls the market for residential real estate services in the Toronto metropolitan area, even though it is not technically a competitor in that market, and referred the matter back to the Tribunal for reconsideration. Following the rehearing, the Tribunal ruled in April 2016 that abuse of dominance was established. (The Tribunal's latest decision is subject to further appeal by TREB.)

In September 2016, the Bureau also filed a notice of application against the Vancouver Airport Authority (VAA) under the abuse of dominance provisions of the Act with respect to restrictions that decrease competition among in-flight catering companies at Vancouver International Airport. Similar to *TREB*, the case involves alleged abuse of dominance in a market in which the VAA technically is not a direct competitor. Hearings are expected to take place in 2017.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

In principle, either a clause or the entire contract may be invalidated as part of a behavioural remedy under section 79. A firm may also agree to modify its contractual terms under a consent agreement. (See question 26.)

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

There is no private right of action for abuse of dominance in Canada. Only the Commissioner may bring applications or register consent agreements with the Tribunal. However, under section 36 of the Act a private right of action is available where an order of the Tribunal has been violated.

Attempts by private litigants to bring cases on the basis of civil conspiracy or torts alleging an abuse of dominant position have not been recognised, for the reason that unlike the criminal provisions, the civil provisions of the Act are presumptively lawful unless and until an order has been granted by the Tribunal.

The Tribunal may order any remedy (structural or behavioural) required to restore competition, including granting access to infrastructure or technology, reinstating supply or goods or services or modifying contractual terms.

Private parties are also entitled to file a complaint with the Bureau with regard to the abuse of dominance provisions. Consumer and competitor complaints are a primary source of leads for Bureau investigations.

Separately, private parties may apply for leave to bring applications before the Tribunal under the refusal to deal (section 75), price maintenance (section 76), and exclusive dealing, tied selling and market restriction (section 77) provisions of the Act, where the underlying requirements of those sections are met. However, AMPs and damages are not available remedies under these provisions, which are technically distinct from the abuse of dominance provisions.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

There is no statutory right to damages as a result of a finding of an abuse of dominance, although section 36 provides a private right of action where an order of the Tribunal has been violated (see question 31).

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Decisions of the Tribunal may be appealed to the Federal Court of Appeal, and ultimately to the Supreme Court of Canada. Courts may refer matters back to the Tribunal for redetermination. While appeals on both questions of law and fact are possible, an appeal on a question of fact may be made only with leave of the Federal Court of Appeal.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Yes. A number of practices may violate the Act if engaged in by non-dominant firms. Section 77 of the Act addresses exclusive dealing, tied selling and market restriction engaged in by 'a major supplier of a product'. Although qualifying as a 'major supplier' still requires a degree of market power, case law indicates that it is lower than that required for dominance.

Sections 75 and 76 of the Act address resale price maintenance and refusals to deal. A firm does not need to be dominant to violate these provisions. However, given that both require an 'adverse effect on competition' to be actionable, a degree of market power on the part of the offending firm is still required.

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China

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The Chinese legal framework for regulating the behaviour of dominant firms includes three pieces of primary legislation and six pieces of secondary legislation in force.

Primary legislation

- The Anti-Monopoly Law (AML);
- the Price Law (Price Law); and
- the Anti-Unfair Competition Law (AUCL). The AUCL is in the process of revising. Lately, the Draft Amendments of AUCL (the Draft AUCL) were deliberated at the 26th Session of the Standing Committee of the 12th National People's Congress and issued for public comments (up to 25 March 2017). In this chapter, the AUCL refers to the currently effective AUCL.

Secondary legislation

- The Provisions for Administrations for Industry and Commerce on the Procedures for Investigating and Handling Cases of Monopoly Agreements and Abuse of Market Dominance (which entered into force on 1 July 2009) (SAIC Procedural Provisions) set out the procedures that the SAIC will follow when investigating and handling restrictive agreements and abusive behaviour by dominant undertakings;
- the Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position (which entered into force on 1 February 2011) (SAIC Dominance Provisions) explain what would be considered to be 'a dominant market position', the types of non-price-related abusive conduct, and SAIC's authority over these activities;
- the Provisions for Administrations for Industry and Commerce on the Prohibition of Abuse of Administrative Authority to Eliminate or Restrict Competitive Acts (which entered into force on 1 February 2011) set out specific provisions with respect to the abusive behaviour conducted by government authorities;
- the Provisions on the Procedures for Administrative Anti-Price Monopoly Law Enforcement (adopted by the NDRC on 29 December 2010) (NDRC Procedural Provisions) set out the procedures that the NDRC will follow when investigating and handling abusive behaviour by undertakings;
- the Provisions on Anti-Price Monopolies (which entered into force on 1 February 2011) (NDRC Anti-Price Monopoly Provisions) set out the prohibited types of price-related abusive conduct by dominant undertakings, as well as the NDRC's authority over these activities; and
- the Procedural Provisions on Price-related Administrative Penalty (which entered into force on 1 July 2013) and the Provisions on the Trial and Examination of Cases in relation to Price-related Administrative Penalties (which entered into force on 1 January 2014) set out the procedures for the NDRC to review and impose penalties for price-related violations of the AML and Price Law.

In addition, the Supreme People's Court (SPC) issued a set of judicial interpretations to provide guidance on how to proceed with civil actions under the AML (ie, the Provisions of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes arising from Monopolistic Practices (which entered into force on 3 May 2012).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The term of dominance is defined as an economic strength possessed by one or several undertakings that enable it or them to control the price or quantity of products or other trading conditions in the relevant market, or to block or affect the access of other undertakings to the relevant market (article 17 of the AML).

Dominance is assessed by reference to various factors. Market share is the first parameter. Under article 19 of the AML, a market share above 50 per cent is presumed dominant. In the case of several undertakings, the combined market share of two undertakings as a whole above two-thirds, or the combined market share of three undertakings as a whole above three-quarters, is presumed dominant. However, any undertaking with a market share of less than 10 per cent is not presumed to be dominant.

In addition to market share presumption, article 18 of the AML further stipulates that dominance could be assessed by reference to the following factors:

- the ability of the undertaking to control the retail market or procurement market for raw materials;
- the financial status and technical conditions or capabilities of the undertaking;
- the extent of dependence on the undertaking by other undertakings in transactions; and
- barriers to entry.

At the secondary legislation level, both the SAIC Dominance Provisions and the NDRC Anti-Price Monopoly Provisions elaborate on the two key concepts in the definition of 'dominance', which are 'other transaction terms' and 'enabling such undertakings to block or affect other undertakings'. The SAIC Dominance Provisions also provide further guidance on how each of the determinative factors is to be assessed in determining the existence of dominance.

It is worth nothing that, issued on 25 February 2016, the first revised draft of AUCL (Revised Draft Submitted for Review) introduces for the first time the concept of 'relatively advantageous position'. This concept has drawn extensive public attention and heated discussion arose in China and abroad. Although the concept has been deleted from the current draft AUCL, some features of authorities' approach in analysing the term 'dominance' could still be inferred. Relatively advantageous position means that in a specific transaction process, one party has a dominant position of fund, technology, market entrance, sales distribution, raw material purchase, etc, and its trading party has dependency on that party so that it is hard to turn to other undertakings. Unfair transaction activities that an undertaking should not conduct by taking advantage of its relatively advantageous position include:

- restricting with whom the trading party trades without any justifiable causes;
- restricting the trading party so that it may only purchase designated goods without any justifiable causes;
- restricting trading conditions between the trading party and other undertakings without any justifiable causes;
- overcharging or unreasonably requesting the trading party to provide other economic benefits; and
- imposing other unreasonable trading conditions.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The AML mainly supports competition-related objectives, but also includes certain non-economic policy objectives. For example, in article 1 of the AML, it provides that the legislation is to protect the 'public interest' and to 'promote the healthy development of the socialist market economy'. Article 7 of the AML specifically focuses on industries of a dominant status granted by the state, but also explicitly prevents the undertakings engaged in such industries from abusing their dominance. This article could be interpreted as an effort to strike a balance between competition policy and industrial policy.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

In addition to the AML, AUCL and Price Law, which apply equally to all sectors of the economy, the following additional legislation regulates dominance in the telecommunications and automobile sectors:

- the PRC Telecommunications Provisions prohibit telecommunications operators from restricting consumer choice; and
- the NDRC issued the Guidelines on Anti-Monopoly in the Automobile Industry (Draft for Comment) regulate the behaviour of automobile suppliers who may have the dominant position in the automobile aftermarket of their respective brand and the abuse of administrative power to eliminate or restrict competition in automobile industry.

These additional legislations are complementary to the general dominance rules in China, and they are largely in line with the general dominance rules but may have a more sector-specific focus.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The AML applies to undertakings, which are defined as 'a natural person, legal person or other organisation that engages in the manufacture or operation of goods or the provision of services'.

Article 7 of the AML deals with undertakings engaged in industries of a dominant status granted by the state, however, it does not exempt such undertakings from the prohibitions under the AML and explicitly prohibiting them from damaging consumer interests.

Article 8 and Chapter 5 of the AML also applies to public authorities. This article requires that a government authority may not abuse their administrative power to eliminate or restrict competition.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The AML requires dominance to be demonstrated when dealing with abusive behaviours of dominant undertakings. It doesn't cover behaviour of non-dominant companies attempting to become dominant.

The Price Law and the AUCL both regulate behaviours of non-dominant firms. More specifically, article 14 of the Price Law prohibits certain pricing below cost where the objective is to exclude competitors. The AUCL prohibits undertakings having relative dominance from making the sale of one product conditional on the purchase of another, and from imposing other unreasonable conditions on a purchaser.

7 Collective dominance

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

Under the AML, the term of dominance is defined as a market position possessed by one or several undertakings that have the ability to control the price or quantity of products or other trading conditions in the relevant market, or to block or affect the access of other undertakings to the relevant market.

When assessing 'collective dominance', the upmost consideration factor is 'market share', explicitly defined in article 19 of the AML. Moreover, the Chinese authorities will also apply the consideration factors in article 18 of the AML for a comprehensive analysis. Hubei Price Bureau's penalty decision on five natural gas companies issued on 12 July 2016 set an example of Chinese authorities' approach. For more specific information, see question 2.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Dominant purchasers are subject to the AML. Article 17 of the AML expressly prohibits dominant undertakings from purchasing goods at unfairly low prices. There is no difference between dominant purchasers and dominant suppliers in terms of the application of the law.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Under the AML, there is no difference as to the approach to define a relevant market for restrictive agreements, abuse of dominance and merger control purposes.

The Guidelines on the Definition of the Relevant Market, which entered into force on 24 May 2009, applicable to all respects of the AML, and enforceable by all Chinese antitrust agencies and courts with jurisdiction, provide guidance on the definition of a relevant market and the methodology used for defining the relevant market.

Article 19 of the AML sets out rules on how a company will be presumed to be dominant in China, where the 'market share' is the first parameter. But, such presumption is rebuttable if there is evidence to the contrary. Any undertaking with a market share of less than 10 per cent is not presumed to be dominant. For more specific information, see question 2.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article 17 of the AML provides that conduct may constitute an abuse if it consists of:

- selling products at unfairly high prices or buying products at unfairly low prices;
- selling products at prices below cost without justification;
- refusing to enter into transactions with other parties without justification;
- limiting other parties to entering into transactions exclusively with them or undertakings designated by them, without justification;
- tying products without justification or imposing any other unreasonable terms in the course of transactions; and
- applying dissimilar prices or other transaction terms to equivalent trading parties that are in the same position without justification.

The SAIC Dominance Provisions and the NDRC Anti-Price Monopoly Provisions provide more details on each type of specific abusive conduct prohibited by law.

The AUCL prohibits undertakings entrusted with a legal dominant status from forcing others to buy the goods of designated businesses so as to exclude other companies from fair competition.

The Price Law prohibits price collusion, predatory pricing, discriminatory pricing and obtaining exorbitant profits, regardless of the existence of dominance.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The AML, the SAIC Dominance Provisions and the NDRC Anti-Price Monopoly Provisions cover both exploitative and exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

These issues have not yet been dealt with in the law or in the practice of enforcement authorities.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The AML provides that certain practices are prohibited where they are 'without any justification'. While the AML itself is silent as to the interpretation of what may be considered to constitute adequate 'justification', some guidance is provided in relation to specific types of abuse in the AML Regulations.

Article 12 of the NDRC Anti-Price Monopoly Regulations prohibits undertakings with dominance from selling goods below-cost price without proper justification, which includes the following:

- selling at reduced prices fresh perishable goods, seasonal goods, goods with an imminent expiry date or overstocked goods;
- selling goods at a reduced price to repay debt, to change production lines or to wind-up a business; and
- promotions for the marketing of new products.

The AUCL prohibits the sale of goods at a price that is below cost for the purpose of excluding competitors.

The Price Law prohibits the sales of goods at below-cost prices in order to exclude competitors or dominate the market except for the legitimate reduction of prices for goods such as seasonal products, or overstocked goods.

Article 16 of the NDRC Anti-Price Monopoly Provisions and article 7 of the SAIC Dominance Provisions provide 'proper justification' for price discrimination. To clarify what could be considered as 'proper justification', article 8 of the SAIC Dominance Provisions provides that two elements should be comprehensively considered: (i) whether the business operator's conduct is based on its normal operating activities and for its normal benefits; and (ii) whether the conduct has an impact on the economic efficiency, public interests and economic development.

Specific forms of abuse

14 Rebate schemes

The AML prohibits dominant undertakings from selling goods below cost without justification, although there is no explicit provision on rebate schemes.

Article 14 of the NDRC Anti-Price Monopoly Regulation prohibits undertakings with dominance, through price discounts or other means, from requiring counterparties to enter into transactions exclusively with them or undertakings designated by them without proper justification.

The first dominance case involving loyalty discounts is the *Tetra Pak* (TP) case in 2016. The SAIC identifies two types of loyalty discounts TP adopted in its carton business between 2009 and 2013: retroactive accumulative volume discount and customised volume target discount. The SAIC found both loyalty discounts have a loyalty-inducing effect. Specifically, in the first scenario, given that the discount applies to all units purchased during a defined reference period, when a customer's purchase volume reaches the threshold, the price that the customer needs to pay drops significantly. Therefore, to obtain more products at a lower price when a customer's purchase volume approaches the threshold, customers tend to continue purchasing until the threshold is met, which leads to a loyalty-inducing effect. In the second scenario, the undertaking with a dominant market position tends to condition its discount on the target percentage and target volume set forth specifically for individual customers, the direct consequence of which would be to lock-in the customer's purchase percentage or volume. By taking into account specific market conditions, the SAIC found that TP's loyalty discount had evident anticompetitive effects.

15 Tying and bundling

The AML prohibits a dominant undertaking from implementing tie-in arrangements that do not have any justification.

Article 6 of the SAIC Dominance Regulations prohibit undertakings with dominance from tie-in sales without any justification, or imposing other unreasonable transaction terms during the course of a transaction, including:

- compulsory bundling or grouping of different products that would not normally be bundled together according to normal transaction practice and consumption habits, or in disregard of the functions of the different products;
- imposing unreasonable restrictions on the terms of contracts, payment methods, transport and delivery methods for goods, or methods of providing services, etc;
- imposing unreasonable restrictions on the sales region, sales targets and after-sale services of products, etc; and
- imposing transaction conditions irrelevant to the subject matter of the transaction.

The AUCL prohibits public utility enterprises and other designated legal monopolies from forcing others to buy goods from designated businesses so as to exclude other operators from competing fairly, and the AUCL also prohibits these operators from entering into tie-in arrangements or imposing other unreasonable conditions on the sale of goods.

In June 2016, the Inner Mongolia AIC, authorised by the SAIC, announced that it had investigated and fined the Inner Mongolia Broadcast and Television network Group (Xilinguole) Company for tying a service fee which should be a voluntary choice to the basic fee. The Inner Mongolia AIC imposed a fine of total 98,000 yuan on the company, which is respectively 1 per cent of its previous year's sales in the relevant market.

In 2016, the high-profile dominance case involving tying was the *TP* case. For more details of the case, see question 29.

16 Exclusive dealing

The AML prohibits an undertaking with dominance from requiring, without justification, undertakings to enter into exclusive dealing agreements with it or an undertaking designated by it.

Article 5 of the SAIC Dominance Regulations prohibits an undertaking with dominance from requiring a counterparty to enter into transactions exclusively with it, or any undertaking designated by it, without any justification.

Article 14 of the NDRC Anti-Price Monopoly Regulations prohibits an undertaking with dominance, through price discounts or other means, from restricting counterparties to enter into transactions exclusively with them or undertakings designated by them without proper justification. 'Proper justification' is further explained to include the following exemptions:

- to guarantee the quality or safety of a product;
- to maintain the image of a brand or to enhance service levels;
- to significantly reduce costs, increase efficiencies and share the benefits generated thereof with consumers; and
- other reasons that can provide justification for the conduct.

In October 2016, the Urumqi AIC, authorised by the SAIC, announced that it investigated and fined the Urumqi Water Group Inc for exclusive dealings of which the company required its customers to trade only with designated undertakings. The Urumqi AIC imposed a fine of total 1,493,891 yuan on the company, which is respectively 1 per cent of its previous year's sales in the relevant market.

In 2016, the high-profile dominance case involving exclusive dealing was the *TP* case. For more details of the case, see question 29.

17 Predatory pricing

The AML prohibits undertakings with dominance from selling products at prices below cost without justification.

Article 12 of the NDRC Anti-Price Monopoly Regulations also prohibits undertakings with dominance from selling goods at below-cost price without proper justification, which includes the following:

- selling at reduced prices fresh perishable goods, seasonal goods, goods with an imminent expiry date or overstocked goods;
- selling goods at a reduced price to repay debt, to change production lines or to wind up a business;
- promotions for the marketing of new products; and
- other reasons that can provide justification for the conduct.

The AUCL prohibits the sale of goods at a price that is below cost for the purpose of excluding competitors.

The Price Law prohibits the sales of 'goods at below-cost prices in order to exclude competitors or dominate the market except for the legitimate reduction of prices for goods such as seasonal products, or overstocked goods'.

18 Price or margin squeezes

Article 11 of the NDRC Anti-Price Monopoly Provisions provides that business operators with dominant positions are prohibited from selling commodities at unfairly high prices or buying commodities at unfairly low prices, taking into account factors such as the price offered by other business operators for the same kind of commodity and the normal price range when costs are generally stable

Besides, such activities may be punished as price discrimination or refusals to deal in disguised form. In practice, enforcement authorities have not made any punishment decision based on price or margin squeezes up to date.

19 Refusals to deal and denied access to essential facilities

The AML prohibits undertakings with dominance from refusing to trade with other undertakings without justification. The SAIC Dominance Provisions and NDRC Anti-Price Monopoly Provisions provide detailed examples of refusal to deal.

Article 4 of the SAIC Dominance Provisions prohibits undertakings with dominance from refusing to deal with a counterparty without justifiable reasons.

Article 13 of the NDRC Anti-Price Monopoly Provisions prohibits undertakings with dominance from refusing to conduct transactions with their counterparties in disguised form by imposing excessively high selling prices or excessively low buying prices without proper justification. A 'proper justification' includes:

- the counterparties have significantly bad credit records, or their operating conditions may lead to relatively significant risks to the safety of the transaction;
- the counterparties are able to purchase the same or substitutable goods from other undertakings at a reasonable price, or to sell goods to other undertakings at a reasonable price; and
- other reasons that can provide justification for the conduct.

As for the issue of denied access to essential facilities, article 4 of the SAIC Dominance Provisions prohibits undertakings with dominance from refusing to allow a counterparty to use, on reasonable terms, its essential facilities during such a party's production and operations.

Article 7 of the SAIC IP Provisions provides that, a business that has a dominant market position shall not, without any justification, refuse to license other businesses to use its intellectual property right under reasonable conditions to preclude or restrict competition if the intellectual property right is part of the necessity facilities for production and trading.

In the determination of the conduct as mentioned in the preceding paragraph, the following factors shall be considered at the same time: the intellectual property right cannot be substituted reasonably in the relevant market, and the intellectual property right is necessary for other businesses to participate in competition in the relevant market.

In the Announcement on Seeking Public Comments for the Guidelines on the Anti-Monopoly Law Enforcement in the Abuse of Intellectual Property Rights (Seventh Draft of the State Administration for Industry and Commerce) issued by the SAIC on 4 February 2016, article 24 provides that that an intellectual property rightholder could legally refuse to license his or her intellectual property right. In general, the anti-monopoly enforcement authorities under the State Council will not require rightholders to bear the obligation to license their intellectual property rights. However, if the holder of an intellectual property right has dominant position in the relevant market, and, particularly, the intellectual property right constitutes the essential facility for production or operation activities, its refusal to license the intellectual property right to other business operators through reasonable requirements, without justified reasons, will eliminate or restrict competition in the relevant market.

Article 28 (iii) provides that for business operators with dominant market position, after their patent becomes an essential patent for a standard, eliminating or restricting the competition by committing refusal to license, tied sales, discriminatory treatment or adding other unreasonable terms is prohibited.

20 Predatory product design or a failure to disclose new technology

There is no provision in the AML concerning predatory product design. Predatory product design is also known as predatory innovation, which is still a novel issue in China. As at the time of writing, there is no relevant enforcement record.

Based on the firm's legal practice, predatory product design could be analysed with five elements in practice:

- there is a market of novelty that is characterised by the emergence of a new product or technology;
- there are primary and secondary markets;
- there is need for interoperability between the above two markets;
- there is dominance in the primary market; and
- there are foreclosure effects in the secondary market.

As for the issue of failure to disclose new technology, it has not yet been dealt with in the law or in the practice of enforcement authorities.

21 Price discrimination

The AML prohibits businesses with a market-dominant position from applying dissimilar prices or other transactional terms to equivalent trading partners without justification. A market-dominant position is the prerequisite for the AML to apply.

Article 16 of the NDRC Anti-Price Monopoly Provisions prohibits undertakings with dominance from price-related discriminatory treatment, without a proper justification, against other parties to a transaction.

Article 7 of the SAIC Dominance Provisions prohibits non-price-related discrimination, including discriminatory treatment, without proper justification, of counterparties that are in a comparable situation in respect of transaction terms such as transaction quantity, the quality of goods, payment method, delivery method, after-sales service and so on.

Article 14(v) of the Price Law prohibits price discrimination towards undertakings of equal trading conditions for the same goods or services. Unlike the AML, article 14 of the Price Law applies regardless of the existence of dominance.

22 Exploitative prices or terms of supply

The AML prohibits undertakings with dominance from selling or buying products at unfairly high or low prices. Article 11 of the NDRC Anti-Price Monopoly Provisions stipulates the following decisive factors in determining the extent to which low or high pricing is unfair:

- whether the sale or purchase price is obviously higher or lower than the price charged or paid by other undertakings to sell or buy the same goods;
- where costs are stable, whether an increase or decrease in the sale or purchase price exceeded normal margins; and
- whether the rate of increase or decrease of the purchase price of goods is obviously higher or lower than the rate of increase or decrease of the cost.

The Price Law prohibits excessive profits that are obtained in violation of laws and regulations.

In July 2016, a decision taken by the NDRC's local branch Hubei Provincial Price Bureau concerned exploitative pricing. This case involved five Chinese pipeline gas supply companies that abused their

Update and trends

Over the past year, China's AML regime has continued to gain momentum with an intensified legislative effort. It is reported that altogether six guidelines are expected to be issued soon by the Anti-monopoly Commission of the State Council. The following legislative efforts concern the area of abuse of dominance.

On 31 December 2015, the NDRC released a draft for public comment of the Antitrust Guidelines on Abuse of IP Rights, which covers anticompetitive agreements and abuse of dominance involving IP rights.

On 23 March 2016, the NDRC released a draft for public comment of the Antitrust Guidelines for Automobile Industry, which covers activities of abuse of dominance in the automotive industry.

On 17 June 2016, the NDRC released a draft for public comment of the Guidelines on the Identification of Illegal Proceeds Derived by Operators from Monopolistic Practices and the Determination of Fines, which covers illegal proceeds from activities of abuse of dominance.

dominant positions and sold products at unfairly high prices. The Hubei Bureau imposed a fine of total 2,955,000 yuan on these five companies, which is respectively 2 per cent or 4 per cent of their previous year's sales in the relevant market. These five companies voluntarily committed to bringing illegal activities to an end.

23 Abuse of administrative or government process

As an ex post approach, Chapter V of the AML regulates the abuse of administrative power by the government authorities to eliminate or restrict competition. The SAIC Dominance Provisions set out in more detail the types of prohibited activities by administrative bodies and the SAIC's authority over these activities.

On 1 June 2016, the State Council promulgated the Opinions of the State Council on Establishing the Fair Competition Review System in the Development of Market System (Guo Fa [2016] No. 34), in which the main objective of setting up the system is to reconcile the laws and regulations at all levels of the Chinese government with the competition law principles.

In the fair competition review system, targets subject to review are rules, regulatory documents and other policy measures that involve the economic activities of market players, such as those on market entry, industrial development, attracting foreign investment, bidding and bids, government procurement, business code of conduct, qualification standards, etc, formulated by government authorities that have the functions of public affairs administration as authorised by laws and regulations. This system is regarded as an ex ante mechanism to comprehensively remove the legal basis for possible abusive behaviour by government authorities.

In 2016, the NDRC investigated 17 administrative monopoly cases and directed local governments to investigate 21 cases (http://news.xinhuanet.com/legal/2017-02/07/c_1120420917.htm). On 29 December 2016, the NDRC published four cases involving abuse of administrative power (http://news.xinhuanet.com/politics/2016-12/29/c_1120212352.htm). One is that the NDRC urged government departments and agencies nationwide to stop any abuse of administrative power when designating certain electricity firms in offering services to newly built residential quarters, and 10 provinces have revoked or amended relevant policies at the request of the NDRC (http://news.xinhuanet.com/politics/2016-12/29/c_1120212352.htm). Another is where the NDRC and Shanghai DRC investigated Shanghai Transport Administration Commission's abuse of administrative power to exclude and restrict competition in Huangpu River tourism industry by inducing boat companies to attend a public flat that was used mainly to unify price and instructing and ensuring enforcement of price monopoly agreement among companies. The Shanghai Transport Administration Commission promised to rectify positively.

In 2016, the SAIC received a total of 51 complaints in 2016, among which 45 complaints regard possible AML violations to local governments for further and detailed investigations. And the SAIC had investigated eight cases of abuse of administrative power in 2016 (http://news.xinhuanet.com/politics/2016-12/29/c_1120212352. htm).

24 Mergers and acquisitions as exclusionary practices

Article 4 of the Interim Provisions for the Assessment of the Effect of the Concentration of Business Operators on Competition issued by the Ministry of Commerce (MOFCOM) on 29 August 2011 provides that when assessing the possibility of negative impact on competition caused by a merger or an acquisition, the possibility of excluding other competitors is the initial factor to be considered by MOFCOM.

25 Other abuses

Abuse of IP rights

Article 55 of the AML tries to strike a balance between the protection of legitimate IP rights and the application of competition law. If an undertaking's conduct eliminates or restricts competition by abusing its intellectual property rights, such undertaking will fall foul of the AML.

The SAIC IP Provisions include provisions on patent pools and identify various types of conduct, which, absent an objective justification, may amount to an abuse of a dominant position. However, the SAIC IP Provisions only regulate non-price-related anticompetitive conduct and bind only the SAIC. Currently, China's top competition advisory body, the Anti-Monopoly Commission of the State Council, is to issue an integrated IPR antitrust guidelines, which is to consolidate four draft versions prepared by the NDRC, the SAIC, MOFCOM and the State Intellectual Property Office.

Under the SAIC IP Provisions, companies with a 'dominant position' are prohibited from engaging in certain types of conduct in exercising their IPRs that are deemed to constitute an abuse of that market power. The non-exhaustive list of abusive conducts includes:

- refusal to license IPRs that amount to 'essential facilities';
- imposing certain exclusivity restrictions;
- imposing unjustified tying and bundling requirements;
- attaching unreasonable trading conditions to an IP agreement, including inserting no-challenge clauses;
- engaging in discriminatory treatment; and
- engaging in practices that are inconsistent with fair, reasonable and non-discriminatory (FRAND) principles in relation to the licensing of SEPs.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The SAIC and the NDRC are the two authorities responsible for the AML enforcement of cases relating to abuse of dominance. The SAIC undertakes investigations into non-price-related abusive conduct by dominant firms, while the NDRC is responsible for investigations into price-related abusive conduct by dominant firms.

The two authorities are entrusted with the power to conduct 'dawn-raid' investigations of business premises or other premises of undertakings under investigation. The authorities also have the power to interview individuals, inspect or copy relevant documents and material, seal or retain relevant evidence and investigate the bank accounts of the undertakings.

The NDRC is responsible for enforcement of the Price Law, while the SAIC is responsible for enforcement of the AUCL.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Under the AML, the sanctions include a fining penalty of between 1 and 10 per cent of the sales revenue for the previous year of the undertaking in breach of the law and to confiscate illegal gains.

Under the AUCL, the sanctions include ceasing the illegal act and being fined between 50,000 and 200,000 yuan. If the abuse involves selling products at high prices or charging excessive fees, illegal income may be confiscated and a fine of between one and three times the illegal income may be imposed.

The Price Law provides that the sanctions include rectifying the violations, confiscating any illegal gains and a fine penalty of up to five times the amount of the illegal gains. An objection notice will be given

and a fine may be imposed if there are no illegal gains. In serious circumstances, the undertaking will be ordered to suspend operations while the infringing behaviour is rectified and the relevant authority may also revoke the business licence of the infringing undertaking.

As of this writing, the highest fine imposed for abuse of dominance is 6.08 billion yuan imposed by the NDRC in *Qualcomm* case in 2015.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Yes, the Chinese competition authorities can impose sanctions directly. Article 10 of the AML provides that the anti-monopoly law enforcement agency designated by the State Council shall be responsible for the anti-monopoly law enforcement work, and such anti-monopoly law enforcement agency may empower corresponding agencies in the governments of the provinces, autonomous regions and municipalities directly under the central government to be responsible for the anti-monopoly law enforcement work.

On 4 February 2016, the SAIC issued the Announcement on Seeking Public Comments for the Guidelines on the Anti-Monopoly Law Enforcement in the Abuse of Intellectual Property Rights (Seventh Draft of the State Administration for Industry and Commerce), which covers abuse of dominance involving IP rights.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In 2016, the NDRC published a decision based on article 17 (1)(i) of the AML (selling products at unfairly high prices or buying products at unfairly low prices). In 2016, the SAIC published six punishment decisions based on abuse of dominance, among which three punished violation of article 17(1)(v) of the AML (implementing tie-in sales or imposing other unreasonable trading conditions at the time of trading without any justifiable causes), one decision punished violation of article 17(1)(iv) of the AML (restricting trading party so that it may conduct deals exclusively with themselves or with the designated undertakings without any justifiable cause), one decision punished violation of article 17(1)(vi) of the AML (applying discriminatory treatments on trading prices or other trading conditions to their trading parties with equal standing without any justifiable causes), and one punished violations of article 17(1)(iv), (v) and (vii) (other forms of abusing the dominant market position as determined by the Anti-monopoly Law Enforcement Agency under the State Council) of the AML.

There is no conclusion on the length of abuse of dominance proceedings from initial investigation to final decision. According to the publicly available notices of past decisions, the length ranges from six months to five years.

The most high-profile dominance case is the *TP* case. On 16 November 2016, the SAIC found that from 2009 to 2013, TP abused its dominant position in aseptic carton packaging machinery for liquid food products, technical services for aseptic carton packaging machinery for liquid food products, and cartons for liquid food product aseptic packaging and conducted tie-in sales, exclusive dealing and loyalty discounts without justifiable reasons in China. To determine TP's market position in the three relevant markets, the SAIC mainly considered the following:

- TP's market share and competition status in the relevant markets, including its competitive advantages in the relevant markets reflected by the changes of its sales margin and its profitability, etc;
- TP's ability to control the market, particularly prices and discounts as well as other trading conditions;
- the extent to which other undertakings (especially the users) depend on TP; and
- the difficulty that other undertakings encounter when entering the relevant markets.

The SAIC concluded that:

- TP was using its dominant position in machinery and technical service markets to impose restrictions on and affect customer's usage of cartons, which damaged the competition in the carton market and violated article 17(1)(v) of the AML;
- TP's restrictions on the use of non-proprietary technical information that excluded the only companies that are able to achieve production at scale of brown paper from supplying brown paper to a third party constituted a violation of article 17(1)(iv) of the AML; and
- TP's two types of loyalty discount scheme have a loyalty-inducing effect and constitute other forms of abuse of dominant market position as prohibited by article 17(1)(vii) of the AML. The investigation lasted for almost five years from January 2012 and the punishment imposed was a fine totalling 667.7 million yuan.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Under the AML, it provides that the enforcement authority may order the cessation of any illegal actions. It does not specifically provide for the consequences of an infringement in relation to the validity of contracts. However, under the Contract Law, any contractual provisions that are in breach of mandatory provisions of laws and regulations are void.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

From legislative perspective, article 50 of the AML provides the possibility for private enforcement against abusive behaviours of dominant firms in the Chinese courts.

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However, the AML doesn't explicitly provide for a basis for a court to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes, companies harmed by abusive practices have a right to claim for damages by submitting a case to a people's court. The relevant court has the power to adjudicate such damages claims.

In 2016, the Yunnan High People's Court ruled on the appeal of *Yunnan YingDing v Sinopec Corporation and Sinopec Yunnan Branch* case. This is the first antitrust case in the petroleum industry and is of great pioneering significance. Based on the AML and the Renewable Energies Law, Yunnan YingDing sued Sinopec in the Kunming Intermediate People's Court for Sinopec's refusal to integrate the biodiesel produced by Yunnan YingDing into its sales system, which was abuse of dominant market position. After the judgment of the first instance, which required Sinopec to accept Yunnan YingDing's products, both parties appealed to the Yunnan High People's Court. In the second instance, the Yunnan High People's Court ruled to revoke the original judgment and to remand the case for retrial. This case ended up with the plaintiff, Yunnnan YingDing, losing the action in the retrial at the end of 2016.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Article 53 of the AML provides that where any party concerned is dissatisfied with any decision made by the Anti-monopoly Law Enforcement Agency punishing activities of abuse of dominance, that party may apply for an administrative reconsideration or lodge an administrative lawsuit according to law.

Under article 28 of the Administrative Reconsideration Law and article 168 of the Civil Procedure Law respectively, administrative reconsideration organs (which is normally the authority vertically superior to the authority having issued the decision) and the people's court of second instance should review both facts and laws.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Not applicable.

Colombia

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Dominant firms in Colombia are subject to the general competition regime of the country, that is, Law 155 of 1959, Decree 1302 of 1964, Decree 2153 of 1992 and Law 1340 of 2009. There are also specific regulations for certain sectors, such as public utilities, health, television, transportation and banking. The general regime also applies to each sector, specific regulations notwithstanding.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

It is defined as the possibility to directly or indirectly determine the conditions of a given market. In determining the existence and magnitude of dominance the antitrust regulator usually uses a test that includes an assessment of market share of the company, market concentration and barriers to entry.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Colombian law establishes that the antitrust authority must protect the free participation of enterprises in the market, consumer welfare and economic efficiency. However, there are a few exceptions, such as Law 590 of 2000, which protects small and medium-sized business by banning illegal interference with a competitor's entry to a market. It can also be argued that the prohibition against price discrimination protects small companies in certain instances.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Yes, the following sectors have additional specific provisions: public utilities, financial sector, health sector, television, telecommunications and transportation. Even though the general provisions concerning illegal conduct for dominant firms apply in all sectors, these additional rules contain specific regulations related to sector-specific behaviour, that derive from broader competition rules that are established in the general competition regime. There also exists a notion of dominance in the contractual context and in consumer protection law, which relates to the inability of a party to a contract to defend itself from certain unfair clauses. This notion does not play a role in the antitrust scenario.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

They apply to every market participant, including governmental entities that participate in the market.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Colombian antitrust regulation of a firm's unilateral conduct (as opposed to agreements with other parties) is generally directed at firms who already possess a dominant position in the market and abuse such position. Generally speaking, companies that lack a dominant position in the market may legally engage in conduct that would be sanctioned as illegal if performed by firms possessing a dominant position. Certain specific conducts that are aimed at acquiring dominance may be sanctioned, such as market foreclosing exclusive dealing agreements.

7 Collective dominance

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

Collective dominance is not addressed directly by the antitrust laws.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

There is no specific regulation of dominant purchasers in Colombian law and the Superintendency of Industry and Commerce (SIC), the general antitrust authority in Colombia, has never, to our knowledge, prosecuted a dominant purchaser for abuse of dominant position. However, general rules against abuse of dominance also apply to purchasing power.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Relevant product and geographic markets are defined under the same provisions established for merger control regulation. In this sense, in order to define the relevant product, it is necessary to identify all products or services with demand-side and supply-side substitutability, and for the geographic market, the area in which such products or services compete with one another.

There is no market share threshold to establish dominance in the general competition regime. The public utility law establishes a threshold of 25 per cent, above which a company will be understood to be dominant.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Abuse is not defined in the law, which makes a general prohibition of abusing dominant position difficult to enforce. Effects-based analysis exists mainly in vertical restrictions and merger control. Abuse of dominance is not necessarily effects-based. There are four specific types of conduct in the general competition regime that constitute abuse of dominant position, which are price discrimination, tying agreements, predatory pricing and interfering with a third party's attempt to enter a market (market foreclosure).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. Even though the law seems designed specifically for exclusionary practices, the antitrust authority has made reference to exploitative practices as well.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Colombian law, generally, simply establishes that certain types of conduct constitute abuse of dominant position when performed by firms who, in fact, possess a dominant position in the market. In this regard, there must be a causal link between the conduct that constitutes abuse of the dominant position and the effective dominance position held in the market by the subject that performs such conduct.

The SIC will be willing to carry out an investigation for the abuse of dominance position only if the market dominance position of the alleged infringer is proved. To reinforce this assumption, in 2012, the SIC sanctioned an important Colombian airline for abusing its dominant position. The investigation was limited to certain flight routes on which this airline held a dominant position. The remaining flight routes were left outside the investigation.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Defences may be addressed to prove that the company does not hold a dominant position in the market or that it did not concur in the conduct that is specifically prohibited in the law. Failing these two defences, the offence is generally punishable. Abuse of dominant position offences in Colombia establish requirements such that situations that are generally used as defences in other jurisdictions, such as meeting competition or market entry, make the conduct not punishable because it fails to meet the requirements for illegality. Efficiency gains are, generally, not a proper line of defence in dominance cases. Intent is very seldom considered in antitrust investigations, as it is sufficient, but not necessary, to establish an antitrust offence.

Specific forms of abuse

14 Rebate schemes

Colombian competition law does not specifically address rebate schemes.

15 Tying and bundling

Tying and leveraging, in the general regime of competition, are considered as an abuse of dominant position when the dominant firm subordinates the supply of a product to the acceptance of additional obligations, which, by their nature, are not related to the object of the principal sale. It should be noted that the SIC identifies certain efficiencies arising from tying that should be observed throughout the characteristics of the relevant market, for each case. In Resolution 40912 of 2012, the SIC identified different forms of efficiencies such as (i) quality control of the tying product; (ii) safety assurance of the tying product; (iii) decrease in both the transactions and the searching costs for customers; and (iv) the advance of the product performance or convenience, which would not constitute an abuse of dominance, if proved.

16 Exclusive dealing

Exclusive dealing and single branding arrangements are illegal when they foreclose the market and, thus, become an entry barrier. One exclusive-dealing arrangement precedent is Resolution 23890 of 2011, in which the SIC determined the existence of a vertical restraint between the only company that carries out studies of television audience measurement, two television channels and an association of advertising agencies and media centres. In this case, the SIC established that an exclusive-dealing arrangement between the aforementioned parties regarding audience measurement studies – which is basic information for the TV advertising market in Colombia – created the following restrictions on competition: an entry barrier to participation in the market for advertising agencies and media centres that were not party to the agreement; and limiting or eliminating competition from any other agent in the advertising market.

In a related development in 2015, by way of Resolution 26129, the SIC held that exclusive-dealing arrangements could be anticompetitive when their sole intent was to limit the access of potential competitors into the market, and therefore, did not have the purpose of achieving certain legitimate efficiencies within it. Through this resolution, the SIC filed a statement of objections against an automobile manufacturer that prevented its dealers as well as its dealers' shareholders and investors from incorporating companies or opening retail establishments through which other manufacturers could sell their cars to final consumers. In this case, the SIC limited the illegality charge to the agreement's purpose and did not study its impact in the market.

17 Predatory pricing

Predatory pricing is considered an abuse of dominant position when a dominant firm lowers prices below costs with the intention of eliminating one or several competitors, or preventing their entry or expansion. In one case the SIC sanctioned a bubble gum producer and distributor because it determined that being a dominant firm, the manufacturer had lowered the price of one of its products below the average total costs during 2002 and 2003 with the intention of eliminating or reducing the market share of one of its direct competitors. Recoupment has never been deemed to be a necessary element of the offence.

18 Price or margin squeezes

There is no specific regulation or precedent for price squeezes under Colombian law. However, a recent decision concerning resale price maintenance described one of the perils of the conduct as being the possibility that upstream market power might be transferred to lower levels of the chain. Under this rule, the SIC could very well hold price squeezes to be illegal.

19 Refusals to deal and denied access to essential facilities

Refusals to deal are banned in a very limited way, when they constitute retaliation for pricing policies. There is no general prohibition against refusing to deal, although in cases of high market power or near monopolies they could be covered by the general prohibition of restricting competition.

In industries where there exists an essential facilities doctrine, such as public utilities and telecommunications, owners of essential facilities, mainly networks, have a duty to deal with competitors and third parties, allowing them access to the networks.

20 Predatory product design or a failure to disclose new technology

In Colombia, there are no rules regarding predatory product design or failure to disclose new technology.

21 Price discrimination

In Colombian antitrust law price discrimination is solely an event of abuse of dominance. During the past few years, the SIC has issued several rulings in which some firms have been penalised for price

discrimination. One of the most relevant cases occurred in 2012, when the SIC penalised a water supply company, arguing that its conduct was against free competition because there was no justifiable reason to apply a different price for the sale of water to some firms that were competing with the company in the market of commercialisation of water.

22 Exploitative prices or terms of supply

In a few occasions the Colombian antitrust authority has interpreted the general prohibition to restrict competition as containing a prohibition against exploitative prices. In a recent decision the SIC determined that exploitative or excessive prices are those that do not hold a reasonable relationship with the 'economic value that inspires them' which, to the SIC, means that the reasonableness of a price must be measured in the light of costs or with the objective of the specific revenue. The SIC wandering into this territory, lacking any regulation on the matter, seems to represent a slippery slope of unpredictable consequences and certainly blurs the lines between antitrust enforcement and price regulation.

23 Abuse of administrative or government process

There are no rules in Colombia regarding abuse of administrative or government process.

24 Mergers and acquisitions as exclusionary practices

With the aim of avoiding any exclusionary practice that results from a merger or an acquisition, Colombian law demands that any operation where two companies or business units are to be integrated, regardless of the legal form of the integration (merger, stock acquisition, certain joint ventures, franchise agreements, asset acquisition or others), must be previously authorised or 'cleared' by the SIC, in the following circumstances:

- when the companies or business units participate in the same economic activity (horizontal operations); or
- when the business units participate in the same 'value chain' (vertical operations).

In this sense, operations that are reviewed by the antitrust authority may be approved, rejected or conditioned on the adoption of either structural or behavioural remedies, depending on the market impact that may result from them. Thus, horizontal integrations are judged in the light of their capacity to increase market power or facilitate its exercise, which is determined from various elements, such as their effect on market concentration, entry barriers, possible coordinated effects, the presence or absence of supply side substitution, price elasticity of demand of the products or services involved.

On the other hand, vertical operations are judged based on their ability to foreclose the market, making entry more difficult or more expensive for competitors or raising costs for competitors in one part of the chain.

It must be borne in mind that, in order to determine the obligation to obtain clearance or the impact of the operation, SIC will take into account not only those companies or businesses over which direct control is exercised, but also those where any kind of influence over the business decisions may be exercised, such as minority holdings in a company that allows power of veto over decisions that may affect the market.

25 Other abuses

Colombian statute and case law have not entered into additional forms of abuse, although the general prohibition to restrict competition could eventually be used by the antitrust authority to develop a doctrine for limiting or outright banning conduct such as strategic capacity construction or underinvestment in capacity, predatory advertising, excessive product differentiation and others.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The general antitrust authority in Colombia is the SIC. There are two exceptions to its universal jurisdiction for antitrust matters in the country: the Financial Superintendency has the power to clear mergers between financial institutions when they are all under the surveillance of the Superintendency, and the Civil Aeronautics authority has the power to authorise certain agreements among airlines.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The SIC may impose, for each violation and to each legal entity that commits the conduct, fines of up to 100,000 minimum wages (approximately US$26,773,064), or up to 150 per cent of the profits derived from the restrictive conduct. The SIC may also order the conduct to cease.

Additionally, the SIC may impose, on individuals who collaborate, facilitate, authorise or condone the commission of the types of conduct described in the general competition regime, fines up to 2,000 minimum wages (approximately US$535,461).

No structural remedies are established by the law.

The highest fine ever imposed for abuse of dominance in Colombia was 91,450 minimum wages (approximately US$22,399,780). This fine was imposed through Resolution 53403 of 2013, in which the SIC determined that the dominant firm in the communications sector violated the general prohibition of the competition regime and obstructed access to marketing channels.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The SIC can impose sanctions directly to entities and individuals, after a full investigation for abuse of dominance position.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Notwithstanding the fact that Colombian authorities are active enforcers of legislation concerning abuse of dominant position, illegal horizontal agreements and merger control generate the majority of antitrust enforcement activity in the country.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

When a dominant company acts as a party in an agreement that included a clause that is inconsistent with the competition legislation, the invalidity of such clause can only be determined by a judge. Courts have no obligation to consult or to follow the antitrust regulator's ruling concerning similar or even the same specific conduct.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is possible in the sense that any person may submit a request for investigation of an antitrust violation and the SIC is obligated to prosecute the offence if, after a preliminary investigation, it finds evidence that prosecution is warranted. Non-parties to the agreement may request injunction-like measures, although these have not been adopted in antitrust investigations in Colombia to date. The remedy against antitrust violations consists of a fine of up to approximately US$25 million (the sum varies with applicable exchange rates) and the order to cease the conduct. There is no established legal regime for claiming damages arising out of antitrust offences. Experts have suggested that the ordinary tort regime or the Unfair Trade Practices Law could be used for this purpose, but this has yet to be attempted in the country.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

As stated in the previous question, there is no established legal regime for claiming damages arising out of antitrust offences. Experts have suggested that the ordinary tort regime or the Unfair Trade Practices Law could be used for this purpose, but this has yet to be attempted in the country.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

The decisions in which the SIC determined an abuse of dominant position, may be challenged before an Administrative Court, but will produce its full effects until it is voided by such court. The process could last years.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

There are rules that apply to the unilateral conduct of non-dominant firms, namely, restrictive practices that do not require market power by the firm committing the infraction, as follows:

- violating the rules on advertising contained in the consumer protection statute;
- influencing a company to increase the prices of its products or services or to refrain from cutting prices; and
- refusing to sell or provide services to a company, or discriminate against it, when it is understood as retaliation for their pricing.

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Croatia

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The legislation applying to the behaviour of dominant firms is, predominantly, the 2009 Competition Act (amended in 2013). This Act defines dominance, which can be held individually or jointly, prohibits abuse of the dominant position and empowers the Croatian Competition Agency (the Agency) to adopt decisions declaring an infringement, prohibiting such conduct, establishing measures and conditions to remedy the adverse effect of such behaviour, and to restore competition, as well as to impose fines.

At the same time, under the EC Regulation No. 1/2003 and article 2a of the Competition Act, article 102 of the Treaty on the Functioning of the European Union (TFEU) is directly applicable in Croatia. The applicable subordinate legislation is the 2011 Regulation on the Definition of the Relevant Market.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

An undertaking can be presumed to be in a dominant position when, due to its market power, it can act in the relevant market to a considerable extent independently of its actual or potential competitors, consumers, buyers or suppliers and, in particular, when an undertaking has no significant competitors in the relevant market or holds significant market power in relation to its actual or potential competitors. The provision lists the criteria that have to be considered when examining the market power of an undertaking. These include market share, financial power, access to sources of supply or to the market itself, connected undertakings, legal or factual barriers for other undertakings to enter the market, the capability to impose market conditions as regards its supply or demand and the capacity of foreclosure against competitors by redirecting their customers to other undertakings. An undertaking that holds more than 40 per cent of the market share in the relevant market may hold a dominant position, but the position of dominance must be determined by the Agency in each individual case through a complex and comprehensive analysis of all the relevant facts and circumstances in the relevant market.

Also, two or more legally independent economic entities may hold a joint dominant position if they act to a considerable extent independently of their competitors, customers or consumers on the relevant market.

Croatian legislation does not recognise different types of dominance in the Competition Act; however, relative dominance is marginally arranged by the Civil Obligations Act as it serves as lex generalis in contractual relations and sets general obligations on bona fides behaviour of the contractual parties, especially between businesses. Also, the Trade Act provides for certain prohibitions of types of unilateral business conduct that are similar to certain forms of abuse and present unfair trading practices.

The case law encompasses different types of behaviour that could be subject to the definition of dominance set by the Competition Act, but does not define different types of dominance itself, beyond the legal definition.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

In general, the object of the legislation and the underlying standard is an economic one. According to the Annual Plans of the Agency in the past couple of years, its mission is to create a market that works well for consumers. Effective competition drives long-term productivity growth based on efficient allocation and use of limited resources, environmental protection, innovation and investment, which promotes this objective.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are no sector-specific regulations on dominance except for the electronic communications sector. The 2008 Electronic Communications Act, as amended, defines the operator with significant market power as an operator who either individually or as an operator controlled by another operator, or jointly with other operators, enjoys a position equivalent to dominance, which means a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, users and consumers. The sector regulatory agency, the Croatian Regulatory Authority for Network Industries (HAKOM) has the right to maintain or amend certain regulatory obligations referred to in the law should it establish that competition on the relevant market is insufficiently effective. However, pursuant to Electronic Communications Act, the application of its provisions must not influence the scope and competence of the competition authority.

The case law of the Agency emphasises its sole competence in dealing with infringements of the Competition Act. At the same time, sector specific control is present for media regulation, railway market regulation, electric energy market and the gas market, although they do not specifically regulate dominance.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules apply to all the undertakings. Undertakings within the meaning of the Competition Act include companies, sole traders, tradesmen and craftsmen and other legal and natural persons who are engaged in a production or trade in goods or provision of services or all of these, and thereby participate in economic activity. The Competition Act also applies to state authorities and local and regional self-government units where they directly or indirectly participate in the market and all other natural or legal persons, such as associations, sports associations, institutions, copyright and related rights holders and similar who are active in the market. The definition of an undertaking also applies to any persons who are engaged in a direct or indirect, permanent, temporary or single participation in the market, irrespective of

their legal form or ownership structure, form of financing and intent or effect to make profit, notwithstanding their place of establishment or residence within the territory of the Republic of Croatia or outside its territory. The dominance rules apply also to undertakings which are entrusted pursuant to separate laws with the operation of services of general economic interest, those having the character of a revenue-producing monopoly, or, which are by special or exclusive rights granted to them allowed to undertake certain economic activities, insofar as the application of the Competition Act does not obstruct, in law or in fact, the performance of the particular tasks assigned to them by separate rules or measures and for the performance of which they have been established. In that way, there are no entities exempt from the application of the dominance rules.

In a 2015 case involving the Archaeological Institute and the Croatian Restoration Institute, the complainant undertaking, Delmat Galiot d.o.o., stated that where public institutions like the Archaeological Institute and the Croatian Restoration Institute, that are financed from state resources, compete in the relevant market and bid in public procurement procedures alongside with private companies, they distort competition in the relevant market. Namely, the complainant assumed that public institutions did not have to bear the costs of hiring experts or ancillary staff, tools, machinery and equipment, given that these costs were all covered from the state budget. In this concrete case the Croatian Competition Agency established that the Archaeological Institute and the Croatian Restoration Institute cannot be considered undertakings holding a dominant position within the meaning of article 12 of the Competition Act, but rather organisations that have been primarily entrusted with the protection and preservation of cultural goods that are under the Croatian law goods of special interest for the Republic of Croatia and therefore enjoy its special protection. In other words, the activities involving restoration, preservation and renewal of cultural property cannot be regarded solely in accordance with competition rules but must also take into account the public interest in pursuing these activities. On the basis of such explanation the initiative of the complainant Delmat Galiot was dismissed.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The legislation covers only the conduct of firms that already are dominant.

7 Collective dominance

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

Croatian law provides that if two or more legally independent economic entities act to a considerable extent independently of their competitors, customers or consumers in the relevant market, they may hold a joint dominant position. In 2007, the Agency established an abuse of a joint dominant position in the *Tisak* and *Distri-Press* case, confirmed by the ruling of the Administrative Court in 2010. In 2015 a number of rejected initiatives claimed an abuse of collective dominance, for example, in the *Croatian Football Federation v Dekod* case. The Agency found grounds to reject such initiatives after conducting preliminary procedures.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The provisions regarding dominance apply equally to dominant suppliers and to dominant purchasers.

Market definition and share-based dominance thresholds

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Pursuant to the 2011 Regulation on the Definition of Relevant Market, the 'relevant market' is defined as a market of certain goods or services that are the subject of business operations performed by an undertaking in a specific geographical territory. A relevant product market comprises all products that are regarded as interchangeable or substitutable, considering the products' characteristics, prices, intended use and customers' patterns. The relevant geographical market comprises the area in which the undertakings compete in the sales or supply of products. The basic criteria for relevant market definition is the demand substitutability for the particular product, as well as the supply substitutability of the particular product and, when necessary, potential competitors or barriers to entry.

The Competition Act states that an undertaking that holds more than 40 per cent of the market share in the relevant market may hold a dominant position. This is merely an indication of a dominant position in the relevant market. Despite this indication the Agency has to investigate all factual circumstances, analysing the structure of relevant market, legal or factual barriers for other undertakings and other facts relevant for the final assessment. It is also possible that an undertaking holding less than 40 per cent holds a dominant position and, vice versa, that an undertaking holding more than 40 per cent does not hold a dominant position.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

By virtue of Croatian law, any abuse by one or more undertakings of a dominant position in the relevant market is prohibited, particularly involving behaviour that consists of directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, markets or technical development to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage and making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts, all in line with the corresponding provision of article 102 TFEU. Although this non-exhaustive list of anticompetitive conduct refers to a form-based approach, the Agency cannot issue a decision establishing an abuse of a dominant position unless it also determines the distortion of competition caused by such conduct over a certain period of time.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse in Croatian law covers both exploitative and exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Dominance itself is not prohibited. Only the abuse of a dominant position is not allowed. To establish the abuse, the Agency first needs to establish dominance. In its case law the Agency has repeatedly underlined that in order to establish the abuse two cumulative conditions need to be fulfilled: the dominant position and the abuse. The abusive conduct may occur on the dominated or the adjacent markets. The Agency has, in various cases, assessed the effects of the conduct of a dominant undertaking in the downstream markets, for example, when a dominant undertaking in the wholesale market was accused of delaying service, thereby influencing the development of competition in the downstream markets.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

As there cannot be any abuse unless the dominance has been determined, the first defence would be to challenge the existence of dominance. In the case where dominance could not be disputed, the

undertaking against which the legal proceedings have been initiated can raise any possible defences, including efficiency gains, to rebut the alleged abuse.

Specific forms of abuse

14 Rebate schemes

In the 2011 *Adris grupa and TDR* case the Agency established that, whereby the former holds controlling interest in the latter, they abused their dominant position in the cigarette sales market, by, inter alia, contracting for restrictive agreements that contained additional obligations imposed by TDR on its buyers in the form of retroactive loyalty rebates. Buyers were obliged to purchase all or a significant part of their requirements only from the undertaking holding a dominant position, but the purchase was rewarded by discounts applying retroactively to purchases made before the threshold is reached (loyalty inducing schemes). The rebates were granted in proportion with the fidelity to the supplier and had encouraged the buyers to satisfy their demand exclusively or almost exclusively with TDR tobacco products. This decision of the Agency was upheld by the High Administrative Court in 2015.

15 Tying and bundling

By its decision, made in July 2007, the Agency recognised tying as an abuse of dominance made by Croatian Telecom and its subsidiary T-Mobile on six relevant markets. Tying was performed by concluding framework agreements on performing of telecommunication services with 23 customers, which contained schedules and attachments under which all of those customers were obliged to perform additional obligations, which by their nature or according to commercial usage, had no connection with the subject of the framework agreements.

16 Exclusive dealing

In the *Adris grupa and TDR* case, mentioned in question 14, the Agency found that one of the most common vertical restraints in the form of single branding resulted from an obligation or incentive that made the buyer purchase practically all his or her requirements in a particular market from only one supplier, TDR. Such single branding produces an anticompetitive effect in the form of foreclosure of the market to competing and potential suppliers and, where the buyer is a retailer selling to final consumers, a loss of in-store inter-brand competition.

17 Predatory pricing

In a complex 2015 case, the Agency found that Hrvatska pošta (Croatian Post, HP) did not distort competition in the provision of letter services in Croatia. In the course of the proceeding the Agency did not find evidence that after 1 January 2013, the point of the full liberalisation of the letter market in Croatia, HP implemented a predatory pricing policy with an exclusionary abuse objective or anticompetitive foreclosure. In other words, there was no evidence that it was engaged in predatory conduct with the objective of excluding existing competitors from the relevant market and deterring entry of new operators. The proceeding was carried ex officio following the complaint of City-Ex stating that HP was allegedly involved in predatory pricing. The decision of the Agency particularly took into account the fact that the provision of letter service, and predominantly the universal postal service as a part of this market, is explicitly regulated and as such constitutes the subject of ex ante statutory regulation falling under the competence of the sector-specific regulator – the Croatian Regulatory Authority for Network Industries (HAKOM).

In the course of the proceeding the Agency analysed whether the criteria were cumulatively fulfilled that are necessary to provide evidence that the allegedly abusive conduct is likely to lead to anticompetitive foreclosure in accordance with the EU *acquis* and the case practice of the European Commission upheld by the rulings of the European Court of Justice. The first criterion is evidence showing that a dominant undertaking engages in predatory conduct by deliberately incurring losses or foregoing profits in the short term ('sacrifice'). The second criterion is evidence of a strategy to exclude competitors, such as a detailed plan to engage in certain conduct in order to exclude a competitor, to prevent entry or to pre-empt the emergence of a market. The third criterion is possible selectivity of the conduct in question where the dominant undertaking may apply the practice only to selected customers, thereby enhancing the likelihood of anticompetitive foreclosure. The fourth criterion is that the predator will be able to raise the price above the competitive level (recoupment capability) once it has forced the competitors to exit the market or deter entry and expansion by competitors, thereby increasing or maintaining its market power in the long run. In conclusion, the Agency found that the above criteria that are necessary to provide evidence that the allegedly abusive conduct led to anticompetitive foreclosure have not been cumulatively met in the case at issue.

18 Price or margin squeezes

In August 2010, the Agency rejected the complaint made by the undertaking B-net Hrvatska against the undertaking Croatian Telecom concerning the alleged abuse of a dominant position in the leased lines market and in the pay-TV service market (IPTV service). They carried out a preliminary analysis of costs incurred by HT in the provision of its IPTV service to end users, which did not indicate predation in the provision of the service concerned. The analysis was based on the already established EU practice and has demonstrated that the pricing policy in the provision of MAXtv service showed no indication of predatory pricing. In the decision the Agency also tackled the margin squeeze as a form of abuse. The Agency established that B-net Hrvatska predominantly used its own infrastructure for the provision of IPTV service for end users. Therefore, the cumulative criteria, which would be necessary for Croatian Telecom to apply a margin squeeze to its rivals in the downstream market by its price policy in the upstream market, have not been met because B-net Hrvatska has not been using the leased lines from Croatian Telecom but its own set of lines for transmission of cable television signals.

19 Refusals to deal and denied access to essential facilities

Kino Zadar Film claimed that Blitz film i video distribucija, as a movie distributor, abused its dominant position by refusing to supply the applicant with a copy of a movie while, at the same time, it supplied it to its own affiliate. In 2011, the Agency rejected the claim as unfounded under article 16 of the 2003 Competition Act. The Agency determined that the most popular movies were made available to Kino Zadar Film on the national release date and the movies that were tagged as less commercially attractive were delivered upon the distributor's choice. Kino Zadar Film claimed that its weaker results were solely caused by the abuse of dominant position by Blitz. The Agency found the claim to be unfounded. Regardless of its findings, the Agency warned Blitz, as a dominant undertaking on the market for movie distribution in Croatia, of its special obligations to treat all exhibitors equally and to offer them a sufficient number of copies in a timely manner along with the possibility to pay a minimum guarantee if the profitability estimate is negative. In 2012, the Agency initiated a proceeding against the national television company – Croatian Radio-televison (HRT), based on indications that HRT abused its dominant position on the market of provision of services of broadcasting television programmes with national coverage by refusing to deal with the undertaking, Digi Satellite TV. The case has been resolved through the commitments proposed by HRT.

20 Predatory product design or a failure to disclose new technology

To the best of our knowledge, there is no Croatian case law on predatory product design or failure to disclose new technology by dominant undertakings in order to force a competitor out of the market.

21 Price discrimination

Both the Constitutional and the High Administrative Court upheld the 2011 decision of the Agency in the *INA (Industrija nafte)* case, in which the abuse of dominance in the form of price discrimination was established. The undertaking breached article 16 of the 2003 Competition Act by contracting jet fuel prices in a non-transparent manner and by applying different prices for domestic and foreign buyers, thereby placing the latter at a competitive disadvantage.

In the *Tisak* and *Distri-Press* case, the Constitutional Court upheld the 2007 decision of the Agency, in which it was established that the undertakings in question, as the only Croatian press distributors operating on the national level, applied dissimilar conditions to equivalent transactions with different trading parties, thus discriminating against

Update and trends

The topic of relative dominance has been much discussed in the past couple of years as there have been many situations where unfair trading practices in business relations have been imposed on a weaker party in business and such abuse cannot be tackled by the antitrust legislation owing to lack of absolute dominance on the market. This problem is especially present in the retail market and agricultural products market. Also, the undertakings are often still unaware of the exact scope and powers of the Agency so they misplace their initiative before the Agency, which then results in a rejection decision. The alternative in the form of private enforcement still does not seem to be an appealing solution for undertakings. Perhaps a new law dealing with such unfair trading practices and entrusting the Agency with the control of such behaviour on the market would be a promising solution. The draft law has been debated fiercely in the last months of 2016 and the first months of 2017 and the minister in charge of the topic announced that the Act on unfair trading practices should come before the Parliament in the first quarter of 2017. It is to be hoped that this new law will introduce some positive changes in the behaviour of businesses, especially in the food chain, and thereby regulate also the issue of relative dominance.

the publisher Media-Ideja in respect of its competitors in the affected daily newspapers publishers market. It is important to stress that both courts (Constitutional and Administrative) emphasised the negative effects of this abuse of dominance towards consumers.

22 Exploitative prices or terms of supply

In its decision in December 2008, the Agency found that Zagreb airport and its catering subsidiary abused their dominance in the markets for the supply and transportation of food to aircraft at Pleso airport in two ways. First, the undertaking breached article 16 of the 2003 Competition Act by ceasing to perform the services of transportation, loading and unloading of catering supplies subject to Croatia Airlines' acceptance of supplementary obligations performed by the Zagreb Airport's catering subsidiary, whose services, by their nature or according to commercial usage, have no connection to the subject of such contracts. Second, the Agency established that the undertaking directly imposed unfair prices by adopting a new price list with a 300 per cent increase on certain services and at the same time imposing different prices for the same services.

23 Abuse of administrative or government process

To the best of our knowledge, there is no Croatian case law on regulatory procedures abused by dominant undertakings.

24 Mergers and acquisitions as exclusionary practices

The Agency has rendered no decisions considering mergers or acquisitions as exclusionary practices under the Competition Act. However, in March 2014, the Agency issued a decision on a conditionally approved concentration between the major retail chains Agrokor and Mercator. The conditions include a detailed set of measures and conditions Agrokor has to fulfil to avoid the negative effects of the merger, all due to its newly acquired dominant position on the retail market. A possible interpretation is that where such measures would not be adequately fulfilled, the said merger could in substance be qualified as structural abuse, even though, in form, it is still in the realm of concentrations.

25 Other abuses

Even though the Competition Act does not explicitly mention other types of abuse, as the list is not exhaustive, the Agency has the liberty of finding and defining such other types. In the 2015 *Croatian Football Federation v Dekod* (HNS) case in which the initiative was rejected, the initiator claimed that the company Dekod, in cooperation with HNS, created the illusion of a great demand for tickets for the Italy v Croatia match in order to sell the tickets for unjustly high prices.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The responsible authority is the Competition Agency. As a general rule, a procedure of determining abuse of dominant position is initiated by the Agency ex officio. The Agency is empowered to conduct dawn raids of business premises, other premises, land and means of transport, which includes the right to enter and inspect all such premises, land and means of transport, to examine the books and other records related to the business, to seize the necessary documentation and to retain it as long as it takes to make photocopies, where due to technical reasons it is not possible to make photocopies during the inspection, to seal any premises and books or records for the period and, to the extent necessary for the inspection, to ask any representative or member of staff of the undertaking for explanations on the facts or documents relating to the subject matter and purpose of the inspection and to record the answers, etc. The authorised persons of the Agency must exercise their powers of surprise inspection upon production to the party to the proceeding or the proprietor of the premises and objects of the identity card and the warrant to carry out surprise inspections issued by the High Administrative Court of the Republic of Croatia. When other authorised persons conduct the inspection they shall produce to the party of the proceedings or the proprietor of the premises the written authorisation to participate in the inspection certified by the Agency.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

When the Agency establishes abuse, it immediately orders a cessation of any abusive practices, imposes measures, conditions and deadlines for the removal of adverse effects of such practices and imposes fines for the infringements. The Agency may also impose structural remedies and behavioural remedies. Structural remedies shall only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

The Agency is authorised to sanction violations of competition law. Fines for severe infringements can be imposed in the amount of up to 10 per cent of the total turnover of the undertaking accrued in the past year for which the financial statements have been completed.

The highest fine for abuse of dominance was set according to the 2003 Competition Act before the Agency was entrusted with the imposition of fines in 2009. The Agency established a violation and prohibited any further restrictive activities, but it was the court that fined Zagreb airport 1.39 million kuna and its subsidiary 147,000 kuna, while the two directors were fined 120,000 kuna each.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Agency can impose sanctions directly. Also, after initiating the proceedings against an undertaking, the Agency may adopt interim measures in cases of urgency owing to the risk of serious and irreparable damage to competition and on the basis of a prima facie finding of infringement of the provisions of the Competition Act. Such a decision on interim measures suspends all actions of the undertaking concerned, insists on meeting of particular conditions or imposes other measures reasonably necessary to eliminate the risk and damage to competition. The duration of the relevant measures, as a rule, may not exceed a period of six months. The undertaking is advised that in the case of its failure to comply with the imposed measures it will be fined for the infringement.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In 2015 there was only one important case on abuse of dominance in which the Agency determined that there was no abuse: it was the

Croatian Post (HP) case described in question 17. There were quite a few initiatives where the Agency rejected the initiative with due explanations and after having performed an in-depth analysis of the relevant markets at stake. In 2016 there were three cases where the Agency established that there were no abuse of dominance: *Hrvatske šume, Ytong porobeton* and *Tahograf*, and even more dismissed initiatives submitted by the complainants.

The average length of the abuse of dominance procedures is 18 months if the Agency deals with the substance (and shorter if it dismisses the initiative).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The Competition Act is silent on the consequences of an abuse of a dominant position on the validity of contracts. However, the Obligations Act foresees that if a performance is impossible, inadmissible, not determined or not determinable, the contract is void. A performance is inadmissible if it is contrary to the Constitution, mandatory rules or morals of society. Competition law falls under mandatory rules (ius cogens) with the exception of the legal notion of commitments, which enables the undertaking to autonomously comply with the allegedly breached provisions of competition law.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Although the Act on actions for damages for infringements of competition law that transposes the 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 into the Croatian national law has been drafted, it has still not been adopted so the private law protection from breaches of the Competition Act is still granted on the basis of the general tort law right to claim damages and is enforced by commercial courts. General rules of the Obligations Act on torts (non-contractual liability for damages) are applicable for antitrust damage claims.

The relevant commercial court rulings in this field are very scarce, one of the few being a case that concerned a subsidiary of the company that runs Zagreb Airport, which provided catering services to Croatia Airlines. This company, which the Agency subsequently (while civil actions were still pending) found to have breached competition rules, sued the other contractual party for the fulfilment of contracts (unilateral increase of prices, which were found by the Agency to constitute an abuse of a dominant position). The infringement decision of the Agency has been viewed as prejudicial so the court did not allow the claim.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Undertakings that have committed infringements are liable for the damages caused by such infringements. The competent commercial court dealing with a damages claim must take account of the final decision of the Agency establishing infringement of the Competition Act or article 102 TFEU, without prejudice to article 267 TFEU. The commercial court may even interrupt the proceeding until the decision of the Agency, the European Commission or the competition authority in another member state has been final and it shall inform the Agency without delay about the submitted damages claim regarding breach of competition law.

The only relevant case in Croatia concerning damages has been filed on the basis of an antitrust decision, which found that a large pharmaceutical wholesaler abused its dominant position. The victim (the owner of a small private pharmacy) sued both the wholesaler and another pharmacy chain, Ljekarne Prima Pharma from Split, for damages.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

No appeal is allowed against the decision of the Agency but the injured party may take actions at the Higher Administrative Court of the Republic of Croatia within a period of 30 days. The Court may review both, the facts and the law.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

There is no special provision with regard to non-dominant firms within the Competition Act. However, the Trade Act provides for certain prohibitions of types of unilateral business conduct that are similar to certain forms of abuse and present unfair trading practices and also, the Civil Obligations Act serves as lex generalis in contractual relations and sets general obligations with regard to fair dealing.

Comparing the provision of the national law with article 102 TFEU we cannot detect any discrepancies. Article 13 of the Competition Act provides basically the same as article 102 and, in that sense, the practice of the Agency has, until now, been thoroughly influenced by the administrative practice of the European Commission.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The behaviour of dominant firms is regulated by sections 10 and 11 of Act No. 143/2001 Coll, on Protection of Economic Competition, as amended (the Competition Act or the Act), which entered into force on 1 July 2001. The Act replaced the Act on Protection of Economic Competition (Act No. 63/1991 Coll, as amended). The principle rationale behind the Competition Act was to bring its text fully into line with EU competition rules. Accordingly, the Act is based on the principles of article 102 of the Treaty on Functioning of the EU (the TFEU).

The Competition Act is enforced by the Office for Protection of Economic Competition (the Competition Office or the Office).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The concept of a dominant position under the Act is based on market power and corresponds with jurisprudence of the European Court of Justice (the ECJ). According to section 10(1), a dominant position is deemed to exist where the market power of an undertaking (or more undertakings) allows it to behave to a significant extent independently of other undertakings or consumers. In practice, the market share of the undertaking in question is the most important factor. The rebuttable market share based presumption pursuant to section 10(3) of the Act provides an important first indication of the existence of a dominant position where the market share of a company exceeds 40 per cent. Other factors that the Office takes into account when assessing dominance include, inter alia, the economic and financial strength of competitors and legal and economic barriers to market entry.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The Competition Act is designed to protect free competition on the market as a means of enhancing consumer welfare. This means that it is the competition, and not the competitors as such, that is to be protected under the Act.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

No; the rules on abuse of dominance, as contained in the Competition Act, apply to all industries. Sector-specific laws such as, for instance, the Energy Act (No. 458/2000 Coll, as amended), the Act on Electronic Communications (No. 127/2005 Coll, as amended) or the Postal Act (No. 29/2000 Coll, as amended), essentially enable the creation of liberalised and non-discriminatory market conditions and establish independent regulatory authorities (eg, the Energy Regulatory Office or the Czech Telecommunication Office). Although the sector-specific legislation includes rules that regulate the behaviour of dominant firms (eg, access to undertakings' electrical or gas grid under the objective and non-discriminatory conditions under the Energy Act or obligations of the significant market power operators in the telecommunications sector), these rules are intended to ensure the correct functioning of the relevant sectors and the regulatory authorities do not have the competence to apply the competition legislation.

The sector-specific rules and the competition legislation are complementary in nature. It has been recognised that effective application of competition rules is indispensable to achieve the full benefits of the liberalisation mandated by sector-specific regulation, which essentially deals with technical and network access issues.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The Competition Act applies to undertakings. Under the Act, the term 'undertaking' means, in principle, any natural or legal persons, their associations and other groupings to the extent that they take part in competition or may affect competition through their activities.

The Act applies to all sectors of the economy and to all private as well as public undertakings. With respect to the undertakings entrusted with the operation of services of general economic interest, the Act provides the same treatment as laid down in article 106(2) of the TFEU. Accordingly, the Act is applied to those undertakings in so far as such application does not render the performance of these services impossible. Services of general economic interest are those universally provided services, which need to be provided on a regular basis, in the entire territory, and for reasonable prices (eg, basic postal service).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Yes; sections 10 and 11 of the Competition Act cover only the abuse of an already existing dominant position. However, the conduct through which a non-dominant undertaking becomes or attempts to become dominant could be prohibited under the merger control rules, which stipulate that a concentration shall be prohibited if it significantly impedes effective competition, in particular as a result of the creation or strengthening of a dominant position.

7 Collective dominance

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

Yes; the Competition Act applies not only to abuse of a dominant position by a single firm, but also to abuses by one or more firms acting together. While the law on abuse of a collective dominance is not yet well developed, it may be assumed that for the collective dominance to exist there must be the ability of a dominant group of firms to behave to an appreciable extent independently and unrestricted on the market and the undertakings concerned must be sufficiently linked among each other.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes; the Competition Act also applies to dominant purchasers, while the dominance of purchasers has to be determined by analogy to the definition of dominant suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Based on the statutory definition of the term relevant market in the Competition Act (section 2(2)), a relevant market is defined as a market of goods (ie, both products and services) that are – from the point of view of their characteristics, price and intended use – identical, comparable or mutually substitutable, and located in the area in which competition conditions are sufficiently homogenous and distinguishable from neighbouring areas.

However, it should be noted that in practice the definition of the relevant market depends on the competition issue being examined by the Competition Office. For instance, the scope of the geographic market might be different when analysing a concentration, where an analysis is prospective, than when analysing past behaviour in dominance cases.

The Competition Office so far has not issued any particular informational material (eg, guidelines or notice) concerning the methodology or strategies it uses for defining relevant markets. However, the decisions of the European Commission, although they do not constitute precedents for the relevant matter, serve as an important source of information and inspiration for defining the relevant markets in the practice of the Competition Office.

The Competition Act contains a rebuttable presumption according to which a firm with a market share below 40 per cent will not be considered to be a dominant. However, when defining a dominant position the Competition Office has to take into account also other criteria such as the structure of the relevant market, barriers to entry or economic and financial strength of the undertakings concerned.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The Competition Act in its section 11 does not define abuse in general terms, but gives a non-exhaustive list of types of abusive behaviour. In addition to examples laid down in article 102 of the TFEU, the Competition Act also lists predatory pricing and essential facility doctrine. Although in principle any conduct of a dominant undertaking fulfilling the formal criteria under section 11 is prohibited, a more effects-based approach is becoming more important in the Office's practice.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes; the concept of abuse under the Competition Act covers both exploitative practices (eg, price discrimination) and exclusionary abuses (eg, fidelity rebates or refusal to supply).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The existence of a dominant position is a prerequisite for the rules on abuse of market power to apply, however, it is not necessary to show that the abuse took place as a result of the existence and exercise of the economic power enjoyed by the undertaking concerned.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The Competition Act does not provide exceptions for conduct found to be an abuse of a dominant position. However, it is acknowledged under Czech competition law that even an undertaking in a dominant position has the right to protect its own commercial interests as a defence against abuse of a dominant position challenges. The dominant undertaking can thus justify the practices concerned on objective grounds. For example, a dominant firm may be well justified in refusing to supply further goods to a customer from whom the payment is overdue.

In addition, based on the more economics-based approach indicated by the Office, the dominant firms may also rely on efficiency defence.

Specific forms of abuse

14 Rebate schemes

Although the rebate systems are not explicitly dealt with in the Competition Act, it is generally acknowledged in the Czech competition law that various rebate and discounting practices carried out by dominant undertakings are likely to constitute an abuse of a dominant position. In particular, loyalty rebates and aggregate rebates are likely to infringe the Competition Act. These types of rebates are challenged by the Competition Office because they tend to restrict the access of competing producers to the market. For instance, in the *Český Telecom* case (2005) the Office held that Český Telecom (today O2 Czech Republic) abused its dominant position by employing special programmes that were designed to induce customers not to obtain telecommunication services from competing providers.

On the other hand, some rebate schemes are considered by the Office as unobjectionable even when operated by a dominant firm. This category covers mainly the automatic quantity discounts (ie, unrelated to the customer's purchases over a certain period of time) and cash discounts for prompt payment.

15 Tying and bundling

Tying is one of the examples of abuse listed in section 11 of the Competition Act. It follows from the Competition Act that an undertaking that enjoys a dominant position on the market for a product or a service may not make the sale of this product or the provision of this service conditional upon the sale of another product or another service. The seminal case on tying involved in 1996 STOCK Plzen's tying of its liqueur Fernet Stock with its other spirits. The Office concluded that STOCK Plzeň was trying to prevent possible problems by using its traditional, well-established and popular liqueur for ensuring smooth sales of other beverages exposed to competition.

16 Exclusive dealing

A dominant undertaking may also infringe the Competition Act by certain types of dealing arrangements that tend to exclude competitors. Such arrangements include exclusive dealing obligations or equivalent practices. For instance, in the *Linde Technoplyn* case (2004) the Competition Office found that Linde abused its dominant position by obliging its customers to purchase the technical gas exclusively from Linde. By these practices Linde harmed the customers by preventing them from the possibility of free choice of technical gas suppliers. Moreover, the Office held that the exclusive dealing obligations made it very difficult if not impossible for other gas suppliers to penetrate the market.

17 Predatory pricing

Sales below costs are, in general, dealt with under section 11(1)(e) of the Competition Act, which provides that an abuse of a dominant position may consist in 'long term offer and sale of goods for unfairly low prices, which results or may result in distortion of competition'. In 2010, the Competition Office fined STUDENT AGENCY, a major Czech coach transport company, for abuse of dominance in the form of predatory prices. STUDENT AGENCY, the dominant operator of public passenger bus services between two largest Czech cities, Prague and Brno, was found to have used unreasonably low prices of its tickets between

1 December 2007 and 1 March 2008 with a view to forcing its competitor, ASIANA, from the relevant route. Following the withdrawal of the competitor, STUDENT AGENCY increased its price to a level that charged before ASIANA entered the market. The Competition Office was able to prove, using email correspondence between the company's managers, that the intent was to squeeze ASIANA from the market. Moreover, the Competition Office proved that the prices applied by STUDENT AGENCY were below average variable costs. Accordingly, it may be concluded that the Competition Office applies for proving predatory prices a test similar to that one set forth by the ECJ in the 1986 *Akzo* judgment.

18 Price or margin squeezes

The Competition Act does not list price squeezes among the examples of prohibited forms of abuse, however, it can safely be assumed that such practices would fall within the scope of the general ban of abuse of a dominant position. The Competition Office has analysed the margin squeeze allegations in the telecommunication sector, namely in the relevant market for broadband access in electronic communications networks. However, to the best of our knowledge, the Office explicitly has not dealt with a price squeeze in its decision-making practice yet.

19 Refusals to deal and denied access to essential facilities

Even though the text of section 11 of the Act does not impose a duty to supply on dominant undertakings, it has been well established in the decision-making practice that, unless objectively justified, refusals to supply by a dominant undertaking may constitute an abuse within the meaning of the Competition Act. For instance, in the *Česká rafinérská* case (2003) the Competition Office found that Česká rafinérská abused its dominant position by discontinuance of supplies of petroleum products to the company Chemapol, a major Czech petrochemical company and an established customer, during the negotiations over the terms of further contract. The Office held that Česká rafinérská interrupted supplies without any objective justification and caused material damage to its major customer.

However, a refusal to supply by a dominant undertaking cannot be considered as an abuse under the Competition Act if it is objectively justified. The justification may relate, first, to the characteristics of the dominant undertaking. For instance, such an undertaking cannot be required to supply a customer if the costs of dealing render its business unprofitable. Secondly, the justification may refer to the behaviour of the undertaking requesting the deal; for instance, a dominant undertaking cannot be obliged to deal with a company, which is at risk of bankruptcy.

The Competition Act provides also for the 'essential facility' doctrine. An essential facility is a facility or infrastructure without access to which competitors cannot provide services to their customers. By way of example, in the *ČSAD Liberec* case (2005) the Competition Office found that a bus transport company ČSAD Liberec, which owned and managed a bus stop terminal in Liberec, abused its dominant position by refusing to negotiate access conditions to this bus terminal with one of its competitors, without objective justification. However, there is no compulsory access to facilities in all circumstances. Access may be denied if the applicant does not satisfy (eg, certain personal requirements, payment conditions), or if there is no free capacity for additional use of the essential facility.

20 Predatory product design or a failure to disclose new technology

Section 11 of the Competition Act is capable of embracing predatory innovation as an abuse. For instance, if the primary reason for the development of a product redesign was to exclude competitors or to frustrate interoperability, then it could be an infringement of the Competition Act. However, and to the best of our knowledge, there is no national case law on this particular issue. It follows from section 11(1)(f) of the Competition Act that an intellectual property right (eg, a patent, a design right or a trade mark) can be considered as an essential facility. Accordingly, a holder of an intellectual property right, which is in a dominant position, might be forced to grant a licence to third parties in order to allow the emergence of new forms of competition under the same conditions as the owner of the essential facility. In 2015, the Competition Office imposed a fine on CHAPS for the abuse of a dominant position. The violation consisted of the refusal to provide information on updated public transport timetables to other undertakings without any objectively justified reason. CHAPS is the only company authorised by the Ministry of Transport to obtain such information for the purpose of managing the national information system on public transport timetables. The conduct of CHAPS thus prevented potential competitors from entering the market for functional competitive products.

21 Price discrimination

Section 11(1)(c) of the Competition Act provides that an abuse may consist in 'applying dissimilar conditions to equivalent transactions with other trading partners, thereby placing them at a competitive disadvantage'. In other words, a dominant firm can abuse its dominant position by discriminating between different trading partners (distributors) in the terms and conditions of trading with them, with the result that some of them are disadvantaged. For instance, in the *Eurotel* case (2002), the Office considered that a GSM operator Eurotel abused its dominant position by charging to its customers, without objective justification, higher fees for calls into the network of newly emerged mobile operator Český Mobil in comparison with the charges for calls made in the network of an already established operator, Radio Mobile.

22 Exploitative prices or terms of supply

Section 11(1)(a) of the Competition Act prohibits direct or indirect imposition of unfair trading conditions, which arguably include also unfair prices. However, the Office declared that it does not intend to play the role of a price control agency or to interfere in the price policy of the undertakings. Instead, the objective pursued by the Office in such cases is to prevent dominant players from using their power on the market to the detriment of consumers and other firms, and to expand possibilities of access to the market. As a consequence, the vast majority of the complaints relating to the alleged abuse of dominance by means of excessive prices has been found groundless by the Office or an amicable settlement was agreed.

On the other hand, imposition of unfair trading conditions was identified as an abuse of a dominant position in several cases in the water and energy sectors. By way of example, in the case of a power-distributing company, Východočeská energetika (1995), the Competition Office found that the said company abused its dominant position by refusal to conclude the contract for electricity supply without settlement of the debt of the previous consumer, which had no relation to the applicant for electricity supply.

23 Abuse of administrative or government process

We are of the view that the instigation of legal (court) proceedings, which is the expression of the fundamental right of access to a judge, should not be, in general, characterised as an abuse of a dominant position. Nonetheless, it cannot be excluded that under specific circumstances the instigation of the government process or the court proceedings may be capable of being characterised as an abuse of a dominant position. This will hold true, in particular, if the dominant undertaking starts the proceedings only in order to harass the opposite party and to eliminate it from the market. However, and to the best of our knowledge, there is no national case law on this particular issue.

24 Mergers and acquisitions as exclusionary practices

With regard to the fact that the strengthening of a dominant position is covered by the merger control rules, there is no case law on structural abuses of a dominant position. However, sections 10 and 11 of the Competition Act may still be applicable on mergers or acquisitions that would escape a system of mandatory merger control due to, for instance, only limited turnovers of the parties concerned.

25 Other abuses

There is no exhaustive list of abusive practices that may fall under section 11 of the Competition Act and, therefore, for instance, inefficiency or neglect may be considered as an abuse. Thus, in the *ŠKODA Automobilová* case (1995) the Office used the 'quiet life' doctrine in support of its decision under which it penalised a dominant domestic car producer for its failure to ensure sufficient production of spare parts for specific types of its cars.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The dominance rules are enforced by the Competition Office located in Brno. The Office is fully independent in its decision-making; it is headed by the chairman, who is appointed by the president of the Czech Republic upon the proposal of the government.

The Competition Office's investigative powers are comparable to those of the European Commission under Regulation 1/2003. Accordingly, the powers include mainly information requests and on-the-spot investigations. Moreover, the officials may suppress opposition from the undertakings when conducting on-the-spot inspections. The Competition Act enables them to force entry or break into cupboards.

The Office is also empowered to inspect, apart from the business premises of undertakings, other premises, including the homes of members of the statutory bodies and other members of staff of the undertakings concerned. However, to conduct an inspection of other premises the Office must have a reasonable suspicion that books and other business records of the company concerned are kept in those premises. Additionally, the Office is entitled to carry out the inspection on non-business premises only with an authorisation from the respective judicial authority.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The Office can impose fines of up to 10 million koruna (approximately €400,000) or up to 10 per cent of net turnover achieved in the last accounting period by the undertaking that abused its dominant position. The fines can be imposed only on undertakings that have offended competition rules, but not on individuals who ordered the violation or who were in charge when the offence occurred.

In May 2009, the Competition Office has imposed a fine of 254 million koruna on Czech Railways (CR), the Czech state-owned railway company, for violating rules on the abuse of a dominant position in the Czech market for rail freight transport by engaging in various discriminating practices. CR brought an action against the decision of the Office before the Regional Court in Brno that annulled the Office's decision. However, the Competition Office brought an appeal in cassation before the Supreme Administrative Court, which set aside in 2016 the judgment of the Regional Court. Accordingly, the proceeding is now pending once again before the Regional Court.

In addition to that, section 20(4) of the Act provides that the Competition Office can impose remedies on an infringing undertaking. No limit is placed on the nature of these remedies (ie, these can be of behavioural or structural nature). In case of behavioural remedies, the Office can require an undertaking, for example, to stop or perform certain conduct, such as the supply of a product to third parties on a non-discriminatory basis. In the case of structural remedies, for example, it can order an undertaking to divest a particular asset or business. However, remedies must be proportionate to the competitive harm created.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Under the Competition Act, the Competition Office has competence to impose fines on undertakings for infringements of the competition rules directly.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

It follows from the official statistics published by the Competition Office that the application of the rules on abuse of dominance was rather rare in recent years (the Competition Office did not adopt any infringement decision in 2016, it issued two decisions in 2015, one in 2014 and none in 2013). On the other hand, it is appropriate to add that cases in the area of abuse of dominance usually involve complex investigations and result in significant fines imposed on the offenders. The Office activity that attracted recently most headlines was its decision in the *CHAPS* case from 2015 in which it penalised the company CHAPS for limitation of competitors' access to the information on updated public transport timetables.

Update and trends

No changes in the Czech competition law are expected in relation to the regulation of behaviour of dominant firms. Nonetheless, it can be expected that a more economic approach would play a more significant role in the competition assessment of abuse of dominance cases.

Furthermore, we assume that the Competition Office will continue its fight against private practices of the dominant undertakings that could prevent realisation of effective competition in the network industries, such as, in particular, energy and telecommunications.

Finally, we expect that the importance and effectiveness of private enforcement will increase in the Czech Republic as a result of a new legislation to be adopted in line with the EU Directive on competition law damages.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Restrictive and unfair business terms and conditions in the contracts concluded in violation of the rules on abuse of market dominance, as provided for in the Competition Act, will be invalid and unenforceable under Czech law.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The Competition Act does not establish a legal framework for private enforcement of the competition rules. Therefore, the potential actions relating to the alleged infringements of the Competition Act would be governed by the general regulation stipulated in Act No. 89/2012 Coll, the Civil Code, as amended and Act No. 99/1963 Coll, the Civil Procedure Code, as amended.

Moreover, the courts must be in position to ensure the protection of the rights of those affected by anticompetitive behaviour. Thus, the competent courts could order a dominant firm to grant access to a network, supply goods, etc. Nonetheless, it seems to us more likely that in practice the courts would stay the proceedings in competition cases before them in order to await the decision of the Competition Office, or to ask the Office to advise the court as amicus curiae.

Finally, it should be noted that in December 2016 the government submitted to the Czech parliament a draft law implementing Directive 2014/104/EU on antitrust damages actions. The proposed legislation should remove main obstacles that have hindered the development of private enforcement of competition law in the Czech Republic so far. As a consequence, the infringers will be more exposed to claims for antitrust damages.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes; in principle, all victims of breaches of competition rules may be granted compensation for damage they suffered. The courts will award damages if the plaintiff proves the existence of the following cumulative conditions: (i) illegal conduct of the other party, (ii) damage

suffered, and (iii) a causal relationship between the illegal conduct of the other party and the damage.

Generally, damages under Czech law cover both direct damage (ie, diminution of the aggrieved party's property) and lost profit (ie, a proprietary harm consisting in the inability of the aggrieved party to achieve a proprietary benefit (profit) that would have been achieved had the relevant practice been valid). However, as there is no substantial case law in the field of competition-based claims for damages, it is very difficult to assess the manner in which Czech courts might calculate damages. However, it could be assumed, for instance, that in cases of refusal to deal, the damages would likely consist of those profits lost by the aggrieved undertaking.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

In administrative proceedings, the Competition Office carries out investigations in order to decide whether to issue a prohibition decision. Such decisions are subject to judicial review of the facts and the law by the Regional Court in Brno. The Court's decisions can be further appealed to the Supreme Administrative Court. The courts carry out an independent review of the cases brought before them and it is by no means rare that the Office's decisions are overturned based on factual or legal errors of the Office.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

On 1 February 2010, Act No. 395/2009 Coll, on Significant Market Power in the Sale of Agricultural and Food Products and Abuse thereof entered into force. This Act introduced stricter national rules applicable to unilateral conduct in the food sector, which go beyond the classical dominance test foreseen under article 102 of the TFEU. The prohibition of unfair trading practices for relatively dominant large food retail chains towards dependent food suppliers is designed to address buyer power in the food retail trade.

In addition, it should be noted that Act No. 526/1990 Coll, on Prices, as amended (the Pricing Act), prohibits abuse of an economic position of a seller by applying selling prices below cost. Although there has been no jurisprudence providing interpretation of the 'economic position' under the Pricing Act, our view is that it would likely require a lower degree of market power than a dominant position under the Competition Act.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The statutory framework applicable to undertakings in a dominant position is laid down in the Danish Competition Act (the Competition Act). Section 11 of the Competition Act prohibits any abuse of a dominant position by one or more undertakings. Danish competition law is to a large extent equivalent to EU competition rules. Section 11 of the Competition Act corresponds to article 102 TFEU and is interpreted in accordance with practice from the European Commission and the European Courts.

Application of section 11 of the Competition Act does not require an affect on trade between member states. However, if a certain practice affects trade between member states within the EU, the competition authorities and the courts apply the national provision together with article 102 TFEU.

The Danish Competition and Consumer Authority (the DCCA) enforces and makes decisions on behalf of the Competition Council (the Council) in minor and relatively uncomplicated cases, whereas the Council decides all cases of general public and fundamental importance, including cases in which a precedent has not yet been set.

Decisions rendered by the DCCA and the Council are subject to appeal before the Competition Appeals Tribunal (the Tribunal), and the Tribunal's decision may be brought before the Danish courts.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The definition of dominance under Danish law is generally identical to the definition provided under EU competition law. An undertaking is deemed to be dominant when it holds an economic position that enables it to prevent effective competition on a given market and act independently from its competitors, customers and ultimately of consumers.

In line with EU practice, an undertaking's market share can be a significant indicator of dominance under Danish law. However, in general the Danish competition authorities also take into account other criteria such as, for example, the market structure, number of market players, potential new entrants on the market, financial strength and market behaviour, existing and potential substitution possibilities in terms of both national and foreign goods and services, entry barriers, opposing buying power, etc.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The aim of the Danish competition law regime and the underlying dominance standard is strictly an economic one. According to section 1 of the Competition Act, the overriding purpose of the Act is to promote efficient societal use of resources through effective competition, benefitting both undertakings and consumers.

The efficiency objective is fundamental under Danish competition law. The concept of efficiency entails that goods and services are produced and distributed at the lowest costs possible, and that the distributed quantities and combinations of goods and services reflect the preferences of users and consumers in terms of both quality and price.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

In principle, there are no explicit sector-specific dominance rules. However, certain areas of law contain rules on conduct governing similar objectives as the competition rules on abuse of dominance (eg, the areas of telecommunications, financial services and postal services). For example, according to the Danish Act on Payment Services and Electronic Monies, providers of electronic payment services may not charge excessive fees and profits. The provision applies to both dominant and non-dominant undertakings.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Section 11 of the Competition Act applies to any form of commercial activity, including the activity of state-owned companies and commercial activity in the public sector. According to the preparatory works for the Competition Act, the concept of commercial activity is subject to a broad interpretation, meaning that the Competition Act covers any financial activity that takes place within a market for goods and services. There is no requirement of financial gains (ie, non-profit undertakings may be considered commercially active undertakings within the meaning of the Competition Act, in the same way as under EU competition law).

According to section 2(2) of the Competition Act, the competition rules do not apply if a conduct of a firm is a direct or necessary consequence of Danish public regulation. Moreover, the Act does not apply to pay and working conditions.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Section 11 of the Competition Act solely applies to firms already holding a dominant position on a given market. Thus, section 11 neither applies to conduct by non-dominant undertakings, nor to undertakings attempting to become dominant.

In accordance with EU case law, it is required for establishing dominance under Danish competition law that market power is maintained for a certain period, meaning that temporary or inconsistent market power is usually insufficient to consider an undertaking dominant.

7 Collective dominance

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

Section 11 explicitly prohibits the abuse of a dominant position by one or more undertakings. Consequently, the prohibition applies to both independently and collectively dominant undertakings.

Collective dominance under Danish law is defined in accordance with EU competition law.

In a decision from 2006, the Competition Council found five taxi companies to be collectively dominant on the market for clearance of taxi vouchers in Copenhagen. Following a long-term cooperation between six taxi companies concerning mutual clearance of each other's vouchers and cards, five of the companies terminated their agreement with the sixth company. This prevented customers from using this company's vouchers when using the other five taxi companies, placing the sixth company at a significant competitive disadvantage. The five companies were issued an order to resume the collaboration with the sixth company on objective, reasonable and non-discriminatory terms.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Section 11 of the Competition Act does not differentiate between dominant purchasers and dominant suppliers (ie, the prohibition against abuse of a dominant position applies equally to both suppliers and purchasers).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

According to section 5(a) of the Competition Act, the definition of the relevant product market and geographical market shall be based on examinations of demand and supply substitutability, as well as potential competition.

The Danish competition authorities use the same criteria in defining the relevant market as the European Commission, the General Court and the European Court of Justice. In practice, however, the DCCA generally defines markets narrowly, leading to more frequent findings of dominance under Danish law than in other jurisdictions.

The Competition Act does not prescribe binding thresholds above which an undertaking will per se be considered dominant. However, the preparatory works for the Competition Act mention some general guidelines concerning thresholds at which an undertaking will be presumed dominant:

- a market share of 25 per cent or less will rarely be considered as sufficient evidence of dominance under Danish law;
- a market share between 25 per cent and 40 per cent will not in itself establish a dominant position – additional criteria must be involved in the assessment;
- a market share above 40 per cent establishes a rebuttable presumption of dominance; or
- a market share above 50 per cent may itself constitute sufficient evidence of a dominant position.

In a decision from 2010, the Tribunal considered a company possessing a market share of above 90 per cent to be in a 'super-dominant' position. It appears from the wording of the decision that such a high market share resulted in the application of a particularly strict abuse standard in the case.

In addition to market shares, the competition authorities also take other criteria into account in the assessment of dominance; see question 2.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 11(3)(i)-(iv) of the Competition Act lists examples of abusive conduct. The list essentially corresponds to that of article 102 TFEU and is not exhaustive.

The Competition Act does not explicitly define the concept of abuse, and neither the Danish courts nor the Council or the Tribunal have provided an all-encompassing definition of the term. Instead, the preparatory works for the Competition Act refer to EU law as a guiding point in determining whether certain behaviour constitutes 'abuse' within the meaning of competition law. Consequently, as under EU law, 'abuse' is defined objectively as a concept relating to the behaviour of an undertaking in a dominant position, which, through recourse to methods differing from those that condition normal competition (ie, abnormal business conduct), affects competition negatively.

In general, the Danish competition authorities strive to have an effects-based approach in dominance cases.

As only the actual or potential harm to the structure of a given market is decisive, a dominant undertaking's subjective intent by certain conduct is principally immaterial in determining an abuse. However, malicious intent may be taken into account by the competition authorities when assessing certain conduct.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

As under EU competition law, Danish law operates with three main categories of abuse: exploitative practices, exclusionary practices and discriminatory practices.

Section 11(3) of the Competition Act lists the following non-exhaustive examples of abuse:

- *directly or indirectly imposing unfair purchase or selling prices or other unfair trading terms and conditions;*
- *limiting production, sales or technical development to the detriment of consumers;*
- *applying dissimilar conditions to services of equal value with trading partners, consequently placing them at a competitive disadvantage; or*
- *conditioning the conclusion of a contract upon the other contracting party's acceptance of supplementary services, which by their nature or according to customary trade practice have no connection with the services subject to the contract.*

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

As under EU competition law, there is no requirement for a causal link between holding a dominant position on a market and the abuse. The concept of abuse does not only include conduct, which can only be exercised through a dominant position, but also conduct which does not necessarily require any market power (eg, conclusion of exclusive agreements). Conduct by a dominant undertaking may thus be abusive, even if the conduct has been instigated upon the initiative of a non-dominant trading partner of the dominant undertaking.

Section 11 equally applies to abusive conduct having negative effect on a market adjacent to the market, where the undertaking concerned holds a dominant position.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The Competition Act does not provide for any express exemptions from the prohibition against abuse of a dominant position. The common

conception, however, is that conduct that is wholly insignificant to the competition on a given market should not necessarily be pursued by competition authorities as abusive under section 11, as public resources must be used as effectively as possible.

In line with this, the Danish Supreme Court stated in a judgment from 2011 regarding a public television service provider's application of retroactive rebates that there needs to be an 'appreciable effect' on competition in order for an abuse to exist. However, what is specifically understood by an 'appreciable effect' and to what extent market coverage needs to be proven in order for a given behaviour to be considered an abuse, may now be interpreted in the light of the European Court of Justice's judgment from 2015 in C-23/14, *Post Danmark II*.

A dominant undertaking may also plead that its conduct is either a direct or necessary consequence of public regulation, objectively justifiable owing to, for example, health or safety reasons related to the nature of the product, or that the conduct creates efficiency gains that also benefit consumers.

In regard to the latter, it is for the dominant undertaking to show:

- that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets;
- that those gains have been, or are likely to be, brought about as a result of that conduct;
- that such conduct is necessary for the achievement of those gains in efficiency; and
- that it does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may be considered abusive under section 11(3)(i) or (iii) of the Competition Act. Danish competition authorities have so far laid down a strict approach in regard to rebates.

Retroactive rebates are largely considered a 'per se abuse', regardless of whether the thresholds applied in the rebate scheme are set generally or individually for each customer, and whether the rebate only affects a small percentage of the market. In a case from 2010, the DCCA found that Post Danmark, the Danish national postal service operator, had abused its dominant position on the market for distribution of magazines by granting retroactive individual fidelity rebates to certain customers in respect of bulk advertising mail. The rebate scheme was implemented in respect of direct advertising mail in 2003, at a time when there was no competition on the market for distribution of bulk mail and when the monopoly on distribution of letters applied to all letters weighing up to 100 grams. The rebate scale rated from 6 per cent to 16 per cent and all customers were entitled to receive the same rebate on the basis of their aggregate purchases over the reference period, namely one year.

Post Danmark brought the competition authorities' decision before the Danish courts, which in turn referred preliminary questions to the Court of Justice on the matter (Case C-23/14). Upon delivery of the Court's judgment on 6 October 2015, Post Danmark discontinued the Danish court case.

In a judgment from March 2011, the Danish Supreme Court found that TV2/Danmark's retroactive turnover-related rebate violated section 11 of the Competition Act and article 102 TFEU. The rebate was calculated based on the customers' expected annual turnover at TV2, and the rebate scale rated from 4.7 per cent to 19.3 per cent.

Incremental rebate schemes are also generally considered problematic, unless either the rebates offered are cost-justifiable under a strict standard or the rebate spread does not exceed 6–7 per cent and is calculated and paid out on a quarterly basis.

15 Tying and bundling

Tying and bundling may constitute an abuse of a dominant position under section 11(3)(iv) of the Competition Act.

In a case from 2008, Unimerco offered free maintenance services for power fastening tools (nail guns, nailers and staplers) on the condition that the customers only used original fasteners (nails and staplers). In addition, Unimerco applied security warnings to their products warning customers against using fasteners produced by others that Unimerco and further informed customers that usage of non-original fasteners would make the warranty void. The case was closed with commitments by Unimerco to alter its trading terms and sales materials.

16 Exclusive dealing

Exclusive dealing, including the conclusion of exclusivity clauses and non-compete clauses, may amount to abuse of a dominant position under section 11 of the Competition Act.

The Council closed a case regarding an exclusivity clause between the Danish news agency Ritzau and the newspaper *MetroXpress* with a commitment decision in 2010. In the case, the Competition and Consumer Authority concluded in its preliminary assessment that Ritzau possessed a dominant position on the Danish market for news services and that the exclusivity could amount to an abuse. Ritzau offered commitments to not bind future owners to purchase general news services from Ritzau, and to shorten the term of the agreement with *MetroXpress* regarding delivery of Ritzau's news services.

17 Predatory pricing

Predatory pricing throughout a longer period with the purpose of driving out weaker competitors by a dominant undertaking is considered abusive pursuant to section 11(3)(i) of the Competition Act. In order to constitute abuse, the low prices may not be a result of large-scale production efficiencies, but must be attributed to significant financial power.

In a decision from 2002, the Council decided that a dominant undertaking is allowed to set lower prices when a competitor sets its prices below the dominant undertaking's average variable costs with the purpose of meeting competition and maintaining customers. In a decision from 2011 concerning Post Danmark's rebates for distribution of magazines, however, the Tribunal specified that a *very* dominant position on a market must result in a particularly narrow application of the 'meeting the competition defence'. Moreover, in order to successfully plead the 'meeting the competition defence' in such a case, the conduct may not have had the purpose of strengthening and abusing the dominant position, must have been justified by efficiency gains, and must be in accordance with general consumer interests.

In a decision from 2004, the Council found that Post Danmark held a dominant position on the market for distribution of unaddressed mail, commercials and local newspapers in Denmark. According to the Council, Post Danmark had not abused its dominant position by, for instance, charging certain customers low prices for mailing services. While the average net prices were not below the average incremental costs (AIC), some of the lowest prices were below the average total costs (ATC) (and in one situation even slightly below AIC). However, as the estimation of Post Danmark's costs was very discretionary, and as the Council could not demonstrate any intent to eliminate competitors, the Council rejected the abuse charge.

In 2013, the DCCA informally examined whether a campaign by an electricity supplier offering one month of free electricity to consumers entering into a six-month electricity supply contract with the dominant firm, was compliant with Danish competition law. The DCCA stated in its advisory opinion that a campaign by a supplier, who has historically had a supply obligation in the area, may potentially affect competition negatively due to the previously established relations with consumers in the area. However, in that particular case the DCCA's immediate assessment was that the campaign did not amount to abusive pricing.

18 Price or margin squeezes

Price squeeze (or margin squeeze) may amount to abusive conduct under section 11(3)(i) of the Competition Act.

A vertical margin squeeze may occur when a dominant undertaking on an upstream market is vertically integrated, and charges prices for wholesale inputs to downstream competitors, leaving downstream competitors with an unreasonable profit margin. In effect, downstream competitors are unable to compete effectively in that particular market.

In a case from 2013, the telecom company TDC offered a number of commitments in order to relieve the DCCA's concerns regarding a possible margin squeeze on the market for retails broadband products. TDC, which held a dominant position on the upstream market for copper infrastructure and had an obligation to deliver wholesale broadband products to its competitors on the retail broadband market, was selling the wholesale products to competitors at a price close to TDC's own prices on retail broadband products to consumers. This possibly

prevented TDC's competitors from competing effectively on the downstream market for retail broadband. TDC committed to documenting to the DCCA that the wholesale prices did not amount to illegal margin squeeze, that is, by altering and clarifying calculation methods in calculating profitability and securing transparency in the company's assessment of revenue and costs.

Finally, in a case from 2014 the Danish payment service provider NETS offered a number of commitments in order to relieve the DCCA's concerns regarding a possible margin squeeze on the market for front-end acquirer processing services.

19 Refusals to deal and denied access to essential facilities

Refusal to deal and denying access to essential facilities may constitute abuse of a dominant position pursuant to section 11(3)(ii) of the Competition Act.

In a decision from 2013, the Council found that Deutz, a German engine manufacturer, had abused its dominant position by refusing to deliver spare parts to renovate 400 IC3 train engines produced by Deutz, to any spare part distributors outside of Deutz' own network. Deutz thereby prevented DSB, a public undertaking operating passenger services on the Danish state's rail network, from ordering spare parts from distributors competing with Deutz. An argument, that the refusal to supply was for resale and thus not abusive, was not exculpatory in the assessment. The Tribunal subsequently upheld the decision, and the case is currently pending before the Danish Maritime and Commercial Court.

20 Predatory product design or a failure to disclose new technology

Predatory product design and failure to disclose new technology are not explicitly prohibited in the Competition Act, and to our knowledge, there are no cases under Danish law having dealt with this specific form of abuse. However, as section 11 is not exhaustive, predatory product design and failure to disclose new technology may be considered abusive insofar as they constitute exploitative, exclusionary or discriminatory conduct and have a negative effect on competition.

21 Price discrimination

According to section 11(3)(v) of the Competition Act, the application of dissimilar terms to services of the same value, thereby placing certain trading partners at a competitive disadvantage, may constitute abuse of a dominant position in breach of section 11(1) of the Competition Act.

In a case from 2011, the Council concluded that CPH had applied discriminatory access criteria for the use of a new low-cost part of a terminal in Copenhagen Airport, thereby abusing its dominant position on the market for flight terminal services. The Council stated that the access criteria to the low cost part of the terminal de facto limited the use of that part of the terminal to certain carriers. Carriers who could not satisfy all the conditions had to use the regular – and more expensive – terminal facilities. Accordingly, CPH had applied dissimilar conditions to equivalent transactions with other trading parties in breach of section 11 of the Competition Act and article 102 TFEU. The Council issued an order for CPH to revoke the three conditions, which were found to be discriminatory.

In another case, which was closed by an informal guidance letter from the DCCA in 2013, the DCCA stated that price discrimination, as a starting point, is good for competition and that all companies, including a dominant company, have a right to grant individual rebates or discounts to its customers. Further, the DCCA stated that unless there are indications that the dominant company's rebates lead to an elimination of competition, the price discrimination will not be considered to constitute an abuse by itself. The DCCA then noted that, in any event, it is a precondition for abuse to be established that the dominant company's customers are competitors and thus can be put in a disadvantageous situation on the downstream market as a result of the price discrimination. This guidance letter could be interpreted as a more effects-based approach to the price discrimination subject.

22 Exploitative prices or terms of supply

According to section 11(3)(i) of the Competition Act, exploitative pricing and application of exploitative trading terms by a dominant firm may be considered abusive.

When assessing whether pricing by a dominant undertaking is excessive, it is essential whether the undertaking imposes prices onto the market or achieves profits, which clearly could not have been achieved on a market with sufficiently effective competition.

In 2007, the Council declared that Elsam A/S (now DONG Energy A/S) had abused its dominant position on the wholesale market for electricity in Western Denmark in 2005 and 2006, by imposing excessive prices. DONG appealed the decision, which was upheld by the Danish Maritime and Commercial Court in August 2016. The Court stated that there was no reasonable connection between the prices and the costs, and that the prices exceeded those which could have been achieved on a market with effective competition. The case is currently pending before the High Court.

In a similar case from 2013, NETS (a provider of payment, card and information services) was found to have violated section 11 by charging excessive fees from web shops, when consumers paid by credit card. The Council ordered NETS to lower the fees to a reasonable level, and the decision was upheld by the Tribunal.

23 Abuse of administrative or government process

Misuse of an administrative or judicial procedure is not explicitly listed as an abuse under section 11 of the Competition Act. However, in a case from 2005, the Council decided that Toyota had abused its dominant position on the market for authorised service of Toyota cars by forcing an authorised Toyota service mechanic to accept a damage claim without the possibility of having the claim assessed by an impartial third party, and by threatening to terminate his contract, should he not accept. The Tribunal stated that enforcement of contractual rights and remedies and instigation of legal proceedings in this regard would not amount to abusive conduct, unless it could be demonstrated that the legal actions were not instigated on a well-founded basis with a justifiable aim, but on questionable grounds and with an objective to restrict competition rather than with the regular aim of such proceedings. On this basis, the Tribunal repealed the Council's decision.

24 Mergers and acquisitions as exclusionary practices

Structural abuse in the form of mergers and acquisitions of competing undertakings as exclusionary practices is covered by section 11 of the Competition Act.

Mergers and acquisitions are generally governed by the rules in Chapter 4 of the Competition Act. In approving mergers between and acquisitions of competing undertakings, the competition authorities assess whether the balance of the market will shift in such a way as to create an unwanted dominant position, which may be abused.

25 Other abuses

The examples of abusive conduct listed in section 11(3) of the Competition Act are not exhaustive. Thus, any exploitative, exclusionary or discriminatory conduct having a negative effect on competition may constitute an abuse of a dominant position within the meaning of the Competition Act.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The DCCA is, as secretariat for the Council, responsible for the day-to-day case administration of the Competition Act and prepares and presents cases for the Council to decide. The DCCA is entitled to make decisions on behalf of the Council in minor cases and cases based on existing case law, whereas the Council decides all cases of general public and fundamental importance, including cases in which a precedent has not yet been set.

The Council is composed of seven members appointed by the Minister of Business. The Council represents versatile knowledge within competition matters, public and private enterprise, including legal, economic, financial and consumer-oriented affairs.

Decisions rendered by the DCCA and the Council are subject to appeal before the Tribunal, which is the highest administrative body. The Tribunal consists of five members, of which the chairperson is a

Supreme Court judge and the four other members generally are legal and economic experts.

Under section 18 of the Competition Act, the DCCA may conduct unannounced inspections at the premises of an undertaking or a public authority – 'dawn raids' – in order to gather information about suspected competition violations. The DCCA is authorised to make copies of any information or documents found on the business premises regardless of the information medium (ie, digital and physical documents, computers, phones). Prior to carrying out a dawn raid, the DCCA must obtain a court order, which establishes the boundaries for the scope of the dawn raid and prevents the DCCA from gathering any information outside of the stated scope.

As opposed to the European Commission, the Competition and Consumer Authority is, however, not allowed to conduct dawn raids in private homes.

The Danish State Prosecutor for Serious Economic and International Crime (the police) may conduct inspections in private homes under certain conditions.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Pursuant to section 11(4) of the Competition Act, the DCCA may issue a range of orders to terminate an existing infringement of section 11. Examples of such orders follow from the non-exhaustive list in section 16(4), and include, for instance, an order for termination of a contract or amendment of trading terms, granting access to certain infrastructure facilities and pricing below a certain level. Acting upon any concerns the authorities may have in relation to section 11, commitments made by an undertaking can be made binding.

Structural remedies have not been used in cases concerning abuse of a dominant position, and orders issuing structural remedies will most likely fall outside the scope of section 16 of the Competition Act.

According to section 23 of the Competition Act, a person or an undertaking may be fined if, intentionally or by gross negligence, that person or undertaking abuses its dominant position. Abuse of a dominant position is not punishable by imprisonment under Danish legislation.

In meting out a fine, section 23(5) of the Competition Act and the preparatory works for the provision state that consideration must be given to (i) the gravity of the infringement, (ii) the duration of the abusive conduct, and (iii) the turnover of the undertaking in question. 'Turnover' is understood as group turnover and not the turnover solely related to the infringing firm.

In assessing the gravity of the infringement, an abuse will fall within one of three categories with the following basic fine levels:

- minor infringement: up to 4 million kroner;
- serious infringement: between 4 million and 20 million kroner; and
- very grave infringement: more than 20 million kroner.

There is no leniency programme concerning abuse of dominance.

In addition, individual fines may be issued to members of management or other employees in key positions who have either participated in the infringement or have failed to act against anticompetitive conduct of which they had knowledge. An individual fine may span from 50,000 to 200,000 kroner depending on the severity of the infringement. In very grave circumstances, a fine may exceed 200,000 kroner.

There have been no fines for abuse of dominance since 2006.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The DCCA and Council decide whether there are sufficient grounds to investigate a case and may issue orders to dominant undertakings to end an existing violation of Section 11 or to prevent future violation.

The Council decides whether a case should be forwarded to the Danish State Prosecutor for Serious Economic and International Crime in order for a fine to be imposed.

Update and trends

The legislative developments regarding section 11 of the Competition Act largely follow the EU developments regarding article 102 TFEU. The Danish competition authorities thus follow the practice of the Union Courts and the Commission closely.

It is to be expected that the outcome of the EU Court's decision in the *Intel* case will affect whether the Danish competition authorities will continue their rather effects-based approach regarding abuse of dominance cases, confer section 11, or not.

Furthermore, it is expected that the current development in terms of the competition authorities rendering fewer but larger (and more fundamental) decisions in abuse cases will continue. Similarly, it is likely that dominant undertakings will appeal decisions from the competition authorities or take the matter to court to a greater extent than before. This would particularly be the case if the developments – as is to be expected in the light of the new Danish Act on Damage Claims for Infringements of Competition Law – begin to focus on the possibility of claiming damages by reference to abuse of dominance.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The DCCA receives numerous complaints regarding alleged abuse of a dominant position on a yearly basis. Of these complaints, only a limited number of cases are pursued and many cases are closed by commitments by the undertaking. Thus, the Danish competition authorities rule on abuse in no more than one or two cases a year (recently even fewer than that).

The Danish competition authorities generally strive to follow the Guidance Paper on the European Commission's enforcement priorities in applying article 102 TFEU to abusive exclusionary conduct. So far, however, the competition authorities have not based any decisions exclusively on the Guidance Paper and have only referred to it to the extent that is has been found compliant with existing law.

The *Post Danmark I* case (see also C-209/10) from 2013 and *Post Danmark II* case (see also C-23/14) have undoubtedly been the most high-profile abuse cases in Denmark in recent years. However, the pending *Elsam/DONG* case concerning excessive pricing on the wholesale market for electricity is also a case to watch.

It is not possible to give certainty as to the expected duration of a case before the competition authorities. However, as a rough estimate, a case before the DCCA or the Council typically takes between two and three years, whereas a case before the Tribunal may take between six and 12 months.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The Competition Act does not regulate the (whole or partial) validity of a contract or a certain provision in the contract found to be in breach of section 11 of the Act.

However, a provision expressly breaching the prohibition against abuse of a dominant position will generally not be enforceable under Danish contract law.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The Competition Act allows for private parties to enforce section 11. Nonetheless, private enforcement has not played a significant role in cases concerning abuse of dominance in the past.

Firstly, it is free to file a complaint with the competition authorities, whereas court proceedings are costly. Secondly, competition authorities will have easier access to information from third parties regarding the relevant market, as well as information from the dominant

undertaking subject to the complaint. The DCCA and the Council may demand all the information, including accounting records, business documents and electronic data that it deems necessary for deciding whether section 11 applies to certain conduct. Failure of a party to comply with such requirements may lead to a fine.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

The right to damages for loss owing to a violation of Danish or EU competition rules is governed by the Danish Act on Damage Claims for Infringements of Competition Law (implementing EU Directive 2014/104), which entered into force in December 2016.

The Damage Claims Act implements several requirements that EU member states are obliged to fulfil with the aim of ensuring effective exercise of the right to compensation for competition law infringements throughout the EU. According to section 3 of the Act, any natural or legal person who has suffered harm caused by an infringement of Danish and/or EU competition law has the right to obtain full compensation for that harm in accordance with the Act on Damage Claims for Infringements of Competition Law.

It is expected that the new act will generate more damages claim cases in Denmark.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

A decision made by the Council or the DCCA may, as a general rule, be appealed to the Tribunal within four weeks after the party in question has been notified of the decision. The Tribunal's decision cannot be appealed to another administrative body, but may be brought before the courts no later than eight weeks after the party in question has been notified of the decision.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

There are no specific rules applying to the unilateral conduct of non-dominant undertakings.

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FERRERE

General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

In Ecuador the relevant legislation is:

- the Organic Law for the Regulation and Control of Market Power, also known as the Anti-Trust Law (Law, MPL or LORCPM). The Law was published in the Supplement of the Official Gazette No. 555 on 13 October 2011;
- the general Regulation to the MPL approved on 23 April 2012 (Regulation or RLORCPM); and
- the Andean Community Decision No. 608 (Decision), which has the status of an international treaty and comprises the guidelines to promote and protect free competition within the Andean Community.

Both the Law and the Decision set forth the legislation applying specifically to the behaviour of dominant firms within Ecuador and the Andean Community, respectively.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The Ecuadorian Antitrust regulation has defined 'market power or dominant position' as the undertaking's ability to act independently from its competitors, buyers, clients, suppliers, consumers, dealers and any other actors that participate in the market. Additionally, it has established that the capacity to significantly influence the market is another factor. For determining dominance, the Competition Authority would consider, among other factors, the market share of the firm, 'the ability to unilaterally fix prices', the capacity to 'reduce output', the capacity of other actors to counterbalance a firm's ability to fix prices or reduce output, a competitor's relative market position, the contestable portion of the market, the structure of supply and demand of the relevant product or service, the existence of entry or exit barriers and a firm's recent past behaviour.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The object of the Law seeks to protect market efficiency, fair trade, consumer welfare and general interest of society through the recognition of the human being as a subject and object of the economic system. Hence, the object of legislation is not strictly economic, since it expressly protects other interests, such as the general interest of society.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Article 9 of the Law is not sector-specific and, thus, applies generally to all markets. However, there are specific regulations in Ecuadorian legislation that apply, in complement to the general rule, upon certain sectors of the economy. For instance, the pharmaceutical industry has a specific regulation to determine the relevant market and the market share of a firm. Notwithstanding this situation occurring in practice, pursuant to article 35 of the Law and article 49 of the regulations to the Law, sector-specific regulations for the application of the Law in relation to abuse of market power and other anticompetitive conducts shall be issued by the Regulation Board, the regulatory body in charge of competition regulation.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The Law of Market Power Control, as set forth in article 2, applies to undertakings (ie, corporations, associations or individuals, entities), private, public, national or foreign, including non-profit organisations with economic activities within the Ecuadorian market or abroad, as long as such activity has effects on the Ecuadorian market.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Ecuadorian legislation forbids and sanctions abuse of market power. Thus, merely being a dominant firm or becoming a dominant firm is not per se prohibited.

Article 7 of the Law, second paragraph, states the following: 'obtaining or reinforcing market power is not a threat to competition.' With this line of reasoning, article 9 of the Law includes a catalogue of types of conduct that are considered an abuse of market power. Hence, the Law does not cover types of conduct through which a non-dominant company becomes or attempts to become dominant; obtaining or reinforcing market power is not in itself prohibited.

7 Collective dominance

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

Yes, collective dominance is provided for in the Law. There is no specific provision that defines collective dominance, however, the definition of abuse of market power established in article 9 of the Law includes 'conducts performed by one or multiple undertakings acting on the basis of their market power'.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes, the legislation applies to dominant purchasers as well as to dominant suppliers. Article 9 of the Law contains a non-exhaustive list of anticompetitive conducts. Some of these are geared specifically to purchasers or suppliers, however, most of the 'exploitative' conducts refer to both purchasers and suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Article 5 of the Law provides a definition of relevant market and states that it is composed of the product market and the geographic market. In relation to the product market the Law states that the product market comprises at least the good or service subject to investigation and its substitutes. It also states that in order to analyse substitution the Authority shall evaluate amongst other factors, the preferences of clients or consumers, the characteristics, uses and price of the substitutes, substitution costs, as well as technological possibilities and time required for substitution. Pursuant to the same provision, the geographic market comprises the set of geographic zones where the alternative supply sources of the relevant product or service are located. In order to analyse the supply alternatives, the Authority will evaluate amongst other factors, transportation costs, sale modalities and existing barriers to trade. Furthermore, Regulation 011 of the Regulation Board establishes criteria to define a relevant market, including a set of economic tools, such as the 'small but significant and non-transitory increase in price' test, that shall be used to define the relevant product and geographic markets. These criteria in principle should be taken into account when defining relevant markets in abuse of market power investigations, as well as in merger control cases. Notwithstanding, the intendancies that deal with abuse of market power investigations and merger control cases operate absolutely independently, which could result in certain differences in the application of the criteria. There are not enough relevant cases that have been taken to and resolved by the Contentious Administrative Tribunal, thus, we cannot comment on the approach taken by the court.

There are no market-share thresholds (in the legislation or case law) at which a company will be presumed to have market power. Market share is only one of the criteria used in order to analyse market power pursuant to article 8 of the Law.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The regime of abuse is based on the anticompetitive effects on the market that specific conduct may have. The Ecuadorian Law establishes, as a general provision, that abuse is produced 'when one or more undertakings, on the basis of their market power by any means, prevent, restrict, falsify or distort competition or adversely affect economic efficiency or general welfare'. The wording of the provision seems to hint that effects must be shown.

The Law does not provide for an effects-based or form-based approach. However, article 4 of the regulations to the Law provides that in order to determine the restrictive character of the conducts and practices of undertakings, the Authority shall analyse their behaviour on a case-by-case basis, evaluating if such conduct or practices have the object or effect to effectively or potentially prevent, restrict, cheat or distort competition, or negatively affect economic efficiency or the general welfare or the rights of consumers and users. From this provision we understand that many types of defences may be available. This provision seems to allow both an effects-based and form-based approach.

The legislation and case law on abuse of market power do not specifically follow an effects-based or form-based approach, however, several of the 23 conducts specifically listed in article 9 of the Law do provide for infringement of the law in the case of occurrence of anticompetitive effects or the potentiality of such effects. Thus, certain conducts could be found to constitute abuse of market power in the absence of actual effects owing to their potentiality.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse in article 9 of the Law covers bot exclusionary and exploitative practices. The list of specific abusive conducts of article 9 describes conducts that are exploitative and conducts that are exclusionary. Article 9 of the Law also contains the specific abusive conduct of 'establishment of exclusionary or exploitative practices'.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The Law does not expressly state that there must be a causal link between dominance and abuse, however, since the law prohibits the 'abuse of market power', we can conclude that the abusive conduct needs to occur through the exercise of market power or dominance, thus, a causal link must exist between market power and abuse.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The Law does not contain a specific provision stating the general defences that may be raised to allegations of abuse of dominance. However, much can be inferred from the wording of article 9.

In the first place, the general provision of article 9 states at the end that abuse of market power occurs when one or many dominant firms 'by any means, prevent, restrict, cheat or distort competition, or affect negatively economic efficiency or the general welfare'. The tense of the verbs contained in the quote hints that an actual effect must have occurred, thus, it could be understood that defences denying these harmful consequences should be accepted (including a defence by denying harm to economic efficiency and perhaps one by evidencing efficiency gains). However, owing to the wording of the 23 specific abusive conducts listed and described in article 9, we could also infer that some conducts may have specific defences available, and that some conducts do not need actual effects occurring to be penalised. Many of the listed conducts refer to 'unjustified' conducts, potentially allowing for a wide range of justifications, a couple of them specifically provide for the efficiency gains defence, and others are considered to occur when they generate actual or potential harmful effects (the three conducts that provide this are exclusionary conducts), hinting that in such cases the exclusionary intent may be sufficient to consider the conduct abusive. Other defences may be possible depending on the case, including technical defences.

Furthermore, article 4 of the regulations to the Law provides that in order to determine the restrictive character of the conducts and practices of undertakings, the Authority shall analyse their behaviour on a case-by-case basis, evaluating if such conducts or practices have the object or effect to effectively or potentially prevent, restrict, cheat or distort competition, or affect negatively economic efficiency or the general welfare or the rights of consumers and users. From this provision we understand that many types of defences may be available.

A technical justification defence was presented in the leading case of abuse in Ecuador (*CONECEL* 2014). In the case, the dominant firm in the mobile telecommunications market, CONECEL, argued that the existence of an exclusivity clause was necessary for technical reasons that guaranteed the quality of the services provided. It is important to recall that this argument was rejected only because CONECEL, in the view of the authority, did not prove the technical necessity of such an exclusivity clause. This shows that a defence based on technical justifications might be accepted.

Specific forms of abuse

14 Rebate schemes

No. 16 of article 9 of the MPL expressly forbids granting conditional rebates or rebates subject to a payment of discount cards or fidelity cards. We are not aware of an investigation resolved under such conduct.

15 Tying and bundling

Under section 8 of article 9 of the MPL, such types of conduct may be considered abusive. To date, we are not aware of an investigation relating to tying and bundling that has reached a resolution stage. However, several processes are in the investigation stage.

16 Exclusive dealing

Under sections 11 and 19 of article 9 of the MPL, unjustified exclusive dealing conducts are considered abusive. To date, we are not aware of an investigation relating to exclusive dealing, non-compete provisions or single branding that has reached a resolution stage.

17 Predatory pricing

The LORCPM considers predatory pricing an abusive practice. Article 9, clause 4 of the Law prohibits 'predatory or exploitative price fixing'. There is no case law regarding this matter and no benchmarks or circumstances have been established.

Although there are no resolved cases under this Law, under Decision 608 the competent authority investigated whether ARCA incurred predatory pricing in the soft drinks market in the *Coca-Cola* case. The authority found that ARCA was dominant in the relevant product market. However, it decided that the company did not commit an abuse of dominant position since its prices were not predatory. In the analysis, the authority performed a study on the firm's price evolution during the period of time under investigation and compared those prices with those of other countries in the region and concluded that the variation of prices responded to market reasons and were duly justified.

18 Price or margin squeezes

Price squeezes are not expressly included in the catalogue of abusive practices contained in article 9 of the MPL. However, the aforesaid catalogue includes a provision for which the authority may investigate any conduct with exclusionary or exploitative effects, thus, price squeezes would presumably fall into the general and broad provision. No price squeeze investigation has been conducted by the authority up to the present time.

19 Refusals to deal and denied access to essential facilities

Both refusal to deal (refusals to satisfy demand or the refusal to supply goods or services) and denial to essential facilities are provided for as abusive practices in article 9 of the Law when they are unjustified. Although the leading case of abuse in Ecuador, *Claro Ecuador SA* (2014), considered an analysis of certain aspects of essential facilities, the authority sanctioned the dominant firm based on different types of conduct, which were the imposition of unjustified exclusivity contracts and the persuasion on third parties not to offer products or services to other undertakings.

20 Predatory product design or a failure to disclose new technology

This conducts are not per se regulated in the Ecuadorian legislation and there have not been investigations in Ecuador related to predatory product design, failure to disclose new technology or technological tying.

21 Price discrimination

Price discrimination is considered to be an abuse of dominant position according to Ecuadorian Law. Article 9, clause 7 establishes that both pricing and non-pricing discrimination might constitute prohibited abuse practices. Both types of discrimination might fall under article 9, clause 6, which prohibits 'unjustified price discrimination, conditions or other forms of price fixing' and also under article 9, clause 7, which sanctions 'the application, in commercial or service relations, of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. Since the entry into force of LORCPM in October 2013, no cases regarding discrimination have been resolved.

22 Exploitative prices or terms of supply

Exploitative prices or exploitative terms of supply are included in the catalogue of abusive practices contained in article 9 of the MPL. As part of the enforcement activities of the Superintendency of Control of Market Power (SCPM), a guideline of supply agreements has been enacted, through which the authority is trying to reduce exploitative terms of supply and prices.

We are aware of several existing investigations that the authority is conducting in reference to exploitative prices and terms of supply, however, no details have been disclosed at the moment.

23 Abuse of administrative or government process

Clause 18, article 9 of the LORCPM sanctions the unjustified misuse of administrative or legal procedures, which results in restricting access or expansion of actual or potential competitors in the market. Under this novel Law, the SCPM has not resolved any cases regarding the abuse of government process. Under the previously applicable regulation (Decision 608), two relevant cases in the pharmaceutical market deserve attention. These are *Susej SA v Eli Lilly* (2011) (*Eli Lilly* case) and the *Pfizer-Sildenafil* case (2011). The *Pfizer-Sildenafil* case was the first case on dominant position abuse through the abuse of administrative and judicial processes. The authority sanctioned the dominant firm, which had imposed a series of precautionary measures with the purpose of maintaining its dominance in the market of Sildenafil production in the national territory.

In the *Eli Lilly* case, Eli Lilly was accused of having unfairly abused government processes through the implementation of precautionary measures that prevented SUSEJ from commercialising products with the active ingredient olanzapine. The antitrust authority rejected SUSEJ's arguments and determined that Eli Lilly did not abuse its dominant position. To reach this conclusion, the authority analysed the ultimate goals of the government processes that were initiated, the number of judicial actions that were presented under the same argument, whether those actions were initiated under the principles of justice administration and the effects that the precautionary measures had on the market. After performing the test under those parameters, the authority concluded that Eli Lilly did not abuse its dominant position. Eli Lilly had a market share of 84.5 per cent in the private market of medicines that have the active ingredient olanzapine.

24 Mergers and acquisitions as exclusionary practices

Ecuadorian legislation does not expressly regulate mergers and acquisitions as a type of exclusionary practice under the provisions of abuse of market power (article 9 of the MPL). Mergers and acquisitions are regulated through article 14 of the MPL that regulates concentrations. Article 14 provides ex ante control (before the concentration takes place) and is not subject to the market power condition contained in article 9, but to thresholds contained in article 16.

The second paragraph of article 7 of the Law states that:

> *Obtaining or reinforcing market power does not infringe against competition, economic efficiency or the general welfare. However, obtaining or reinforcing market power, in a manner that impedes, restricts, cheats or distorts competition, infringes against economic efficiency or the general welfare or the rights of consumers and users will be subject to control, regulation and, if applicable, subject to the penalties established in the law.*

Notwithstanding this provision, there is no specific provision establishing an 'anticompetitive' gaining of market power as an anticompetitive conduct, nor a provision establishing a punishment.

25 Other abuses

Ecuadorian legislation provides, in the catalogue of types of conduct that are considered as forms of abuse contained in article 9 of the Law, among others, the following:

Update and trends

The term of the Superintendent ends during 2017; the appointment of a different Superintendent may generate shifts in enforcement practice.

- abuse in the case of economic dependency through the termination of commercial agreements without prior notice or other conduct;
- implementation of unjustified cross-subsidies; and
- and unjustified resale price fixing.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Superintendency of Market Power Control is the highest administrative authority with broad powers to investigate and sanction abuse of market power. The Superintendency comprises the following authorities: Superintendent of Market Power Control, First Instance Commission and intendancies.

As provided in sections 48 and 49 of the MPL, the Superintendence authority has the following powers:

- to conduct abuse of market power investigations ex officio or ex parte;
- to resolve investigations and, if applicable, order pre-emptive measures, sanctions and remedial actions; and
- for the purposes of the investigation, the authority can:
  - request any information and documents relevant to the investigation from denounced parties, defendants and third parties, including, but not limited to, financial statements, accounting books, correspondence and magnetic data;
  - order testimony of the defendants and third parties in the presence of legal counsel, through depositions that are conducted by designated members of the Superintendency; and
  - enter into the business place of the defendant, with or without previous notice, in order to examine books, records and any documents relevant to the investigation, as well as taking any voluntary testimony of the people that are on the premises. During the inspection, any magnetic or physical documents can be seized or a copy of documents can be obtained.

The Abuse of Market Power Intendant, who is an undersecretary or investigation authority (appointed by the Superintendent), conducts the investigation process and if there are grounds, the Intendant will prosecute the defendants before the First Instance Commission. If the ruling of the First Instance Commission is challenged, then it has to be resolved by the Superintendent of Market Power Control, as the highest administrative authority and final administrative instance.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

As provided in article 73 of the MPL, the Superintendency may order remedial actions, such as:

- the ceasing of the abusive practice under certain conditions or terms; and
- executing contracts or conducting activities that aim to re-establish the competitive process under conditions or terms imposed by the authority.

Besides the remedial actions, the Superintendency may also impose economic sanctions for abuse of market power, under the following terms (see article 79 of MPL):

- if the abusive conduct was considered severe, the fine can be up to 10 per cent of the turnover of the undertaking (gross sales without VAT); and
- if the abusive conduct was considered very severe, then the fine can be up to the 12 per cent of the turnover of the undertaking.

It is worth stating that the legal representatives of the undertaking and any individual who has been involved in the decision-making (regarding the abusive conduct), may be sanctioned with a fine equal to 500 basic salaries (at the time, the basic salary is equal to US$375,00).

In 2014 the Superintendency (the *Claro* case) ordered a fine of US$138.5 million against a dominant telecommunications firm, along with remedial actions. In 2016 an additional fine of US$82 was imposed for refusal to comply with some remedial actions, specifically for not formally amending the exclusivity clauses contained in their lease contracts with the owners of the real estate where their towers are located.

Ecuadorian legislation does not contain an express provision regarding the application of structural remedies in abuse of market power investigations nor the guidelines to apply such remedies (ie, if no equal behavioural measure can be adopted). We are not aware of any structural remedy ordered by the authority as a result of abuse of market power investigations.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Yes. The competition enforcer can impose sanctions directly.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The enforcement record in Ecuador has not been calculated, or is not readily available. Resolutions of the Authority, although public are generally not readily available in online sources or other means. Although Resolutions are occasionally available in printed versions at the Authority's facilities, no structured work has been performed to catalogue and publish the Resolutions in a readily available source. Notwithstanding, we understand that there are efforts underway by the Authority to achieve this in the near future. We believe that when this is achieved enforcement records and other information useful as precedents will be available.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

As a general rule, the clause will be invalidated. However, if the agreement is also regulated through article 11 of the MPL, as a banned horizontal or vertical agreement, then the entire agreement may be considered null and void.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The LORCPM grants broad powers and attributions to the SCPM, including enforcement action during the investigation and after a final decision has been produced. These powers and attributions include the access to infrastructure during and after the investigation. Further, article 37 of the LORCPM establishes that the SCPM has the attribution to 'correct ... the abuse of market power', suggesting that it could order the necessary measures in order to achieve such a goal. In the *Claro* case, the SCPM ordered the dominant firm to eliminate all exclusivity clauses in contracts for rental of real property. The Law does not provide for private enforcement possibilities (other than to privately claim damages).

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Any person or entity that has suffered losses or damages due to conduct that is sanctioned by the Law has the right to reparation for such

losses or damages. For this purpose, the affected person might initiate proceedings in an ordinary court under the general rules of Ecuadorian law through a summary proceeding. The right to initiate proceedings expires in five years counted from the decision imposing the sanction being final and enforceable.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The decisions of the First Instance Commission may be appealed before the Superintendent, in administrative venue, as provided in article 67 of the MPL. However, the Superintendent decision may be recurred before the Administrative Tribunal, throughout an extraordinary action.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Not applicable.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Article 102 of the Treaty on the Functioning of the European Union (TFEU) is the statutory provision governing the abuse of dominance in the European Union. European Council Regulation No. 1/2003 sets forth the procedures for the application of articles 102 (and 101) TFEU. It is complemented by a series of implementing regulations, notices and guidance papers – the most important of which, for abuse of dominance purposes, is the European Commission's Guidance on its Enforcement Priorities in Applying article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings (the Guidance Paper).

Broadly, there are four conditions for article 102 TFEU to apply: (i) the entity at issue must qualify as an 'undertaking'; (ii) the undertaking must hold a dominant position on a relevant market; (iii) the undertaking's conduct must abusively restrict competition; and (iv) the conduct must affect trade between member states.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is not defined in article 102 TFEU. EU Court judgments, Commission decisions and the Guidance Paper, however, define dominance as a position of economic strength that confers on a company 'the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers' (Guidance Paper, paragraph 10; Case 27/76 *United Brands* ECLI:EU:C:1978:22 (*United Brands*), paragraph 65; Case 85/76 *Hoffmann-La Roche* ECLI:EU:C:1979:36 (*Hoffmann-La Roche*), paragraph 38). The courts also refer to a dominant company as 'an unavoidable trading partner' (*Hoffmann-La Roche*, paragraph 41; Case C-95/04 P *British Airways*, Opinion of Advocate General Kokott ECLI:EU:C:2006:133, paragraph 52).

A first step in assessing dominance is to define a relevant market (see question 9). An undertaking can then be considered dominant where it is able to raise (or maintain) prices on a market above the competitive level for a significant period of time (Guidance Paper, paragraph 11).

The Courts and the Commission have identified various factors that can indicate dominance. The Guidance Paper classifies these factors into three non-exhaustive categories (paragraph 12):

- constraints imposed by competitors (involving an assessment of market structure and market shares);
- the threat of expansion by existing competitors or entry by potential competitors; and
- the importance of countervailing buyer power.

Market shares can provide a useful first indication of a company's potential market power or dominance, but the broader market context must also be taken into account in this assessment. This includes fluctuations in shares over time, the existence of barriers to entry, customer buyer power, spare production capacity, rates of innovation, and the ease and rate of customer switching.

As just one example, the General Court in *Cisco* found that even shares of about 90 per cent do not indicate market power where products are offered for free, there is a high rate of innovation, and users can easily switch between alternatives (Case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The dominance standard is strictly economic. Sociopolitical or other non-economic factors are not considered.

Likewise, the goal of article 102 TFEU is the generation of consumer welfare through the competitive process. In particular, EU competition rules seek to put in place a system of undistorted competition as part of the internal market established by the EU (Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83, paragraph 22). The aim is to protect the competitive process, not individual competitors (Case C 8/08 *T-Mobile Netherlands BV*, Opinion of Advocate General Kokott ECLI:EU:C:2009:110, paragraph 71). As Advocate General Wahl has recently advised, 'EU competition rules seek to capture behaviour that has anticompetitive effects' (Case C-413/14 *Intel*, Opinion of Advocate General Wahl ECLI:EU:C:2016:788, paragraph 43).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Article 102 TFEU applies equally to all sectors.

There may, however, be sector-specific rules implemented at member state level through national laws and national regulations. The Commission has also issued Directives in certain sectors, including communications, the postal sector, energy and rail transport. These may create specific, additional obligations on companies in these sectors.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The prohibition on abuse of dominance applies to 'undertakings'. This is interpreted widely: '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.' (Case C-41/90 *Höfner* ECLI:EU:C:1991:161, paragraph 21).

If public bodies carry on economic activities, they are subject to abuse of dominance rules with regard to those activities. Public bodies, however, are not subject to the dominance rules with respect to their public tasks.

For example, in *Eurocontrol*, the exercise of powers relating to the control and supervision of air space were not of an economic nature (despite the fact that Eurocontrol collected route charges) and it did not therefore constitute an undertaking for those purposes (Case C-364/92 *Eurocontrol* ECLI:EU:C:1994:7).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Article 102 TFEU applies only to dominant firms. It does not cover the conduct of non-dominant companies attempting to become dominant (such as 'attempted monopolisation' under section 2 of the US Sherman Act).

7 Collective dominance

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

Yes. Article 102 TFEU may apply to one or more undertakings (acting individually or collectively). The leading cases on collective dominance are *Airtours* (Case T-342/99 *Airtours* ECLI:EU:T:2002:146 (*Airtours*) (which concerned collective dominance under merger control) and *Laurent Piau* (Case T-193/02 *Laurent Piau* ECLI:EU:T:2005:22) (which concerned collective dominance under article 102 TFEU).

As a general matter, for there to be a finding of collective dominance, the collectively dominant firms must either enjoy some structural or contractual link or be active in a market that otherwise allows them to coordinate their behaviour.

So far, all article 102 TFEU decisions finding collective dominance have been based on agreements between firms leading them to behave as a collective entity; there are no cases to date where article 102 TFEU has applied to mere tacit collusion.

In the merger context, the Commission has found that collective dominance may occur as a result of tacit collusion among competitors where: (i) a monitoring mechanism permits firms to arrive at tacit collusion; (ii) a deterrence mechanism permits firms to sustain collusion; and (iii) current and future competitors, as well as consumers, cannot jeopardise the collusion (*Airtours*, paragraph 62).

If collective dominance is proved, each individual undertaking is in principle subject to the special responsibility of dominant firms under article 102 TFEU. One collectively dominant company can commit an abuse even if not acting jointly with the others, but the conduct must be 'one of the manifestations of such a joint dominant position being held' (Case T-228/97 *Irish Sugar* ECLI:EU:T:1999:246, paragraph 66).

Collective dominance is not mentioned in the Guidance Paper and would therefore not appear to be a Commission priority.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes. Article 102 TFEU applies to dominant purchasers (see, eg, the General Court's judgment in *British Airways* (Case T-219/99 *British Airways* ECLI:EU:T:2003:343, paragraph 86). In that context the assessment of dominance turns on the buyer's ability to impose purchasing terms on their suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The approach to market definition is the same in article 102 TFEU cases as in merger control or under article 101 TFEU. A relevant (product and geographic) market circumscribes the sources of competitive constraint faced by the company under investigation. It comprises all those 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' (Market Definition Notice, paragraph 36).

Substitutability should be assessed by the SSNIP or hypothetical monopolist test: this asks whether a hypothetical monopolist could profitably sustain a price that is a 'small but significant' amount (usually 5–10 per cent) above competitive price levels over a range of goods. If not, the market definition is widened to include the products that customers would switch to in response to a price increase.

As to market share thresholds, in the *Akzo* judgment, the Court of Justice established a (rebuttable) presumption that a company is dominant if it holds a market share of 50 per cent or more (Case C-62/86 *Akzo* ECLI:EU:C:1991:286 (*Akzo*), paragraph 60). The Guidance Paper states that dominance is not likely if the undertaking's market share is below 40 per cent (paragraph 14).

That said, even above the 50 per cent threshold, it is necessary to consider the nature and dynamics of a particular market. In markets subject to a high degree of innovation or where services are offered for free, shares (even above 90 per cent) may not be a good proxy for market power (Case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635 and Case COMP/M.7217 *Facebook/WhatsApp* 3 October 2014).

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

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

Article 102 TFEU does not define the concept of abuse. Instead, it lists four categories of abusive behaviour:

- article 102(a) prohibits directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- article 102(b) prohibits limiting production, markets or technical developments to the prejudice of consumers;
- article 102(c) prohibits applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- article 102(d) prohibits making 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.

Broadly, the categories of abuse can be grouped into: (i) exclusionary abuses (where a dominant company strategically seeks to exclude its rivals and thereby restricts competition); and (ii) exploitative abuses (where a dominant firm uses its market power to extract rents from consumers). Exclusionary abuses are by far the most common type of abuse.

The definition of abuse has largely grown out of the case law and been fleshed out in the Guidance Paper. The classic formulation of an abuse is behaviour that 'which, through 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' (*Hoffmann-La Roche*, paragraph 91).

But not all conduct that affects rivals is anticompetitive. Competition on the merits, by definition, may lead to the 'departure from the market or the marginalisation of competitors that are less efficient' (Case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172, paragraph 22). The challenge for agencies and undertakings alike in article 102 TFEU cases is therefore to distinguish between abusive conduct and vigorous competition on the merits.

Case law qualifies certain categories of conduct as 'by nature' abuses: 'by nature' abuses do not require a full analysis of anticompetitive effects. Exclusive dealing and discounts conditioned on exclusivity are examples of by nature abuses. By nature abuses, however, are not the same as per se infringements because the dominant company always retains the possibility of objectively justifying its conduct.

Outside the 'by nature' exceptions, the Commission has to perform a fully fledged effects analysis. This will apply, for example, to tying, product design, pricing abuses and refusals to supply. An effects analysis for exclusionary conduct requires proving at least the following four elements.

First, the dominant company's abusive conduct must hamper or eliminate rivals' access to supplies or markets (Guidance Paper, paragraph 19). In other words, the abusive conduct must create barriers to independent competition (Case 262/81 *Coditel II* ECLI:EU:C:1982:334, paragraph 19).

Second, the abusive conduct must cause the anticompetitive effects (Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651, paragraph 47). Causation must be established by comparing prevailing competitive

conditions with an appropriate counterfactual where the conduct does not occur (Guidance Paper, paragraph 21).

Third, the anticompetitive effects must be reasonably likely (Case T-201/04 *Microsoft* ECLI:EU:T:2007:289 (*Microsoft*), paragraph 1089). 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 (Case T-70/15 *Trajektna luka* ECLI:EU:T:2016:592, paragraph 24).

Fourth, the anticompetitive effects must be sufficiently significant to create or reinforce market power (Guidance Paper, paragraph 11, 19).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. As explained in response to question 10, article 102 TFEU covers both exclusionary abuses (such as tying, refusal to supply, or exclusive dealing) and exploitative abuses (such as excessive pricing or imposing unfair trading conditions).

The Commission's enforcement activity over the past decade has focused almost wholly on exclusionary abuses, and the Guidance Paper sets enforcement priorities only for exclusionary conduct. There are, however, indications that the Commission would like to increase its caseload on exploitative abuses (see Updates and trends).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

There is case law suggesting that it is unnecessary to show a causal connection between dominance and the abuse (Case 6/72 *EContinental Can* ECLI:EU:C:1973:22 paragraph 27). These cases are quite old, however, and it is generally expected today that the Commission must demonstrate a connection between the dominant position and the abusive conduct. Indeed, in *Tetra Pak II,* the Court held that article 102 TFEU 'presupposes a link between the dominant position and the alleged abusive conduct' (Case C-333/94 *Tetra Pak* ECLI:EU:C:1996:436 (*Tetra Pak II*), paragraph 27).

In exceptional circumstances, an abuse may occur on an adjacent market to the dominant market (*Tetra Pak II*). For this to apply, there must be 'close associative links' between the adjacent market where the conduct occurs and the dominant market.

Irrespective of the above, the Commission must still prove causation in fact. In particular, it must show that the abusive conduct actually causes the posited anticompetitive effects (as noted in response to question 10, this should be done by reference to an appropriate counterfactual). In *AstraZeneca*, the Court confirmed that 'a presumption of a causal link ... is incompatible with the principle that doubt must operate to the advantage of the addressee of the decision finding the infringement' (Case C-457/10 *AstraZeneca* ECLI:EU:C:2012:770, paragraph 199).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Even if conduct is found to constitute an abuse and to restrict competition, a company can always show that its conduct is objectively justified. This applies for all abuses, including 'by nature' abuses.

The dominant company bears the evidentiary burden to substantiate an objective justification. It is then for the Commission to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the 'justification put forward cannot be accepted' (*Microsoft*, paragraph 688).

Conduct may be justified if it is either objectively necessary or produces efficiencies that outweigh the restrictive effects on consumers (Case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172, paragraph 41; Guidance Paper, paragraph 28). The Guidance Paper notes that 'the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking' (Guidance Paper, paragraph 28). The EU Courts have also held that a dominant company may justify its conduct based on legitimate 'commercial interests' (*United Brands*, paragraph paragraph 189-191). In *Motorola* and *Samsung*, for example, the Commission accepted that it is legitimate for a holder of standard essential patents to seek injunctions against patent users that are not 'willing licensees'. (Case AT.39985 *Motorola*, 29 April 2014; and Case AT.39939 *Samsung* 29 April 2014).

The Guidance Paper sets out four requirements for a company to justify abusive conduct that forecloses its rivals (paragraph 30): First, the conduct must cause efficiencies; these efficiencies are not confined to economic considerations in terms of price or cost, but may also consist of technical improvements in the quality of the goods (*Microsoft*, paragraph 1159; Guidance Paper, paragraph 30). Second, the conduct must be indispensable to realising those efficiencies. Third, the efficiencies must outweigh the negative effects on competition. And fourth, the conduct must not eliminate effective competition by removing all or most existing sources of actual or potential competition.

As to exclusionary intent, this is not a necessary element of an abuse because an abuse is 'an objective concept' (*Hoffmann-La Roche*, paragraph 91). That said, evidence as to the company's intent may be useful in interpreting its conduct (Guidance Paper, paragraph 20). As the Court of Justice held in *Tomra*, 'the existence of any anticompetitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused' (Case C-549/10 *P Tomra* ECLI:EU:C:2012:221, paragraph 20).

Specific forms of abuse

14 Rebate schemes

The grant of rebates to consumers is generally pro-consumer and thus pro-competitive. But certain forms of rebates may constitute an abuse if applied by a dominant company. The concern is that the dominant company exploits its larger base of sales to offer discounts in ways that preclude smaller (but equally efficient) rivals from competing for the contestable portion of a customer's demand.

The case law generally distinguishes between three categories of rebates: rebates based on volumes of purchases, rebates conditioned on exclusivity and loyalty-inducing rebates.

The first category – forward looking volume-based rebates – is presumptively lawful (*Hoffmann-La Roche,* paragraph 90; Case T-203/01 *Michelin v Commission* ECLI:EU:T:2003:250, paragraph 58). This reflects gains in efficiency and economies of scale.

The second category – rebates conditioned on exclusivity – has been condemned in a number of cases, including *Hoffmann-La Roche, Michelin, British Airways*, and Case T-286/09 *Intel* ECLI:EU:T:2014:547 (*Intel*) as presumptively unlawful. Exclusivity rebates have historically been treated as restrictive of competition 'by nature' and therefore do not require proof of anticompetitive effects.

The third category – loyalty-inducing rebates – require a full assessment of circumstances to analyse whether the rebate is likely to foreclose equally efficient competitors or make it more difficult for purchasers to choose their sources of supply (Case C-209/10 *Post Danmark I* ECLI:EU:C:2012:172, paragraphs 31–32).

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 the rebate is ultimately likely to foreclose an equally efficient competitor.

In addition, whether a rebate is retroactive or incremental is an important part of the assessment of all the circumstances. The Commission and EU Courts take a strict approach to retroactive rebates (which pay discounts retroactively on past purchases over a reference period if the customer meets pre-defined quantity targets (see, eg, Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651)). The concern is that the rebate creates a suction effect that makes it less attractive for customers to switch small portions of incremental demand to rivals (Guidance Paper, paragraph 40). Incremental rebates, on the other hand, do not create the same suction effect and are considered less of a concern (although they can still be problematic depending on the other factors set out above). In his recent *Intel* Opinion, Advocate General Wahl has advised that exclusivity rebates 'should not be regarded as a separate and unique category of rebates' (Case C-413/14 *Intel* Opinion of Advocate General Wahl ECLI:EU:C:2016:788, paragraph 106). Instead, exclusivity rebates are 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 Court of Justice will determine the issue.

15 Tying and bundling

Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product.' Five conditions must be established for a finding of abusive tying (*Microsoft*):

- the tying and tied good are two separate products;
- the undertaking concerned is dominant in the tying product market;
- customers have no choice but to obtain both products together;
- the tying forecloses competition; and
- there is no objective justification for the tie.

Typically, the core issue is establishing whether two components constitute separate products or an integrated whole. In *Microsoft*, the Court held that this assessment must be based on a number 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 also [...] commercial practice' (*Microsoft*, paragraph 925).

A company could achieve the same effect as tying by ostensibly offering a standalone version of the tying product alongside a tied version, but at a price that realistically means customers will not purchase the standalone version. This is referred to as mixed bundling.

The Guidance Paper states that such bundled discounts should be assessed not under the tying framework described above, but in the same way as other forms of pricing abuse, by allocating the discounts fully to the price of the non-dominant tied product (paragraph 60). According to the Guidance Paper, 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 equally efficient rivals can replicate the bundle.

16 Exclusive dealing

The Guidance Paper defines exclusive dealing as an action by a dominant undertaking 'to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates' (paragraph 32).

The concern is that the exclusivity condition enables the dominant company 'to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share' (*Intel*, paragraph 93). A threshold question is therefore whether the clause involves the company leveraging a non-contestable share of demand.

If leveraging of a non-contestable share is established, the next question is to determine whether the condition constitutes exclusivity. The test is whether the purchaser has 'to obtain all or most of their requirements exclusively' from the dominant undertaking' (*Intel*, paragraph 72)

As to what 'all or most of their requirements' actually means: 70–80 per cent of a purchaser's requirements will constitute 'most' and therefore be considered as exclusivity (*Intel*, paragraph 135; *Hoffmann-La Roche*, paragraph 83). Similarly, the Vertical Restraints Block Exemption refers to an exclusive agreement as one where a buyer must purchase more than 80 per cent of its requirements from the seller (article 1d).

In *Intel*, however, the General Court referred to exclusivity requirements 'in a certain segment' (*Intel*, paragraph 79). HP was required to purchase 95 per cent of its requirements for microprocessors in a specific sector. The General Court held that this constituted exclusivity even though it only amounted to 28 per cent of HP's total requirements for microprocessors (the judgment is under appeal).

Exclusivity arrangements have been treated as restricting competition by their very nature. They therefore do not require proof of actual restrictive effects (although see response to question 14 concerning the Advocate General's Opinion in *Intel*; if the Court of Justice follows the Advocate General, they would require an assessment of all the circumstances).

17 Predatory pricing

Predatory pricing arises when a dominant company prices its products below cost such that equally efficient competitors cannot viably remain on the market.

A two-stage test applies to classify predatory pricing as abusive: first, pricing below average variable cost (AVC) is presumptively abusive (*Akzo*, paragraph 71); second, 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 (*Akzo*, paragraph 72).

The Guidance Paper, however, indicates that the Commission will usually use alternative benchmarks – in particular, long-run average incremental cost (LRAIC) and average avoidable costs (AAC). In practice, however, this makes little difference because AVC and AAC will usually be the same, and ATC and LRAIC are good proxies for each other (Guidance Paper, fn. 18).

Recoupment (that is the ability of the dominant firm to raise prices once other competitors have been foreclosed and thus recoup its costs associated with predatory pricing) is not a formal precondition of predatory pricing under article 102 TFEU (*France Telecom v Commission Case C-202/07 France Telecom* ECLI:EU:C:2009:214). The Guidance Paper, however, suggests that the Commission will likely assess the impact of below-cost pricing on consumers as part of its analysis (paragraph paragraph 69-71).

18 Price or margin squeezes

A margin squeeze occurs when a vertically integrated company sells an input to its downstream rivals 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' (Guidance Paper, paragraph paragraph 64-66; *TeliaSonera*; and *Deutsche Telekom Case C-280/08 Deutsche Telekom* ECLI:EU:C:2010:603).

19 Refusals to deal and denied access to essential facilities

Generally, dominant companies are free to decide whether to deal (or not) 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' (Case C-7/97 *Bronner* ECLI:EU:C:1998:264, paragraph 57). Refusal to supply cases have generally concerned alleged exclusion of rivals (ie, refusals to deal that may provoke the elimination of a competitor) or other conduct clearly in pursuit of an anti-competitive aim. As a practical matter, absent a competitive relationship between the customer and the dominant company, a refusal to supply an actual or potential customer is very unlikely to infringe article 102.

Even when dealing with rivals, though, a refusal to supply products or access to facilities can only be found abusive in exceptional circumstances. The following three conditions need to be met for this to be the case (Case *C-7/97 Bronner* ECLI:EU:C:1998:569; Cases 6/73 to 7/73 *Commercial Solvents* ECLI:EU:C:1974:18; Cases T-374/94 et al, *European Night Services and Others* ECLI:EU:T:1998:198):

- the requested input must be indispensable (ie, it is an essential facility);
- the refusal to supply is likely to eliminate competition in the downstream market; and
- there is no objective justification for the refusal.

If the refusal involves intellectual property, the refusal to license must also prevent the emergence of a new product (*C-418/01 IMS Health GmbH & Co* ECLI:EU:C:2004:257; Cases C-241/91 to C-242/91 *Magill* ECLI:EU:C:1995:98; and *Microsoft*).

A refusal to supply can be express or constructive (ie, the dominant company insists on unreasonable conditions for granting access to the facility).

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 time frame (*Bronner, IMS Health, European Night Services*).

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.

For this reason, past essential facilities cases typically involve state-funded natural monopolies such as ports (Case IV/34.689 *Sea Containers v Stena Sealink*), airport facilities (Case IV/35.613 *Alpha Flight Services/ Aéroports de Paris*), or gas pipelines (Case IV/32.318 *London European – Sabena*, 4 November 1988), or essential inputs for downstream products like basic chemicals (Joined Cases 6/73 to 7/73 *Commercial Solvents* ECLI:EU:C:1974:18) or interoperability information (*Microsoft*).

20 Predatory product design or a failure to disclose new technology

Product design

Product design can only be found abusive in exceptional circumstances. Either the design must have no redeeming value and serve only to exclude competition or there must be additional factors that impede rivals' ability compete independently.

In the first scenario, the design must be introduced solely to render rivals' products incompatible or to exclude rivals from the market. There is only one such example in EU case law: the changes in transmission frequencies in *Decca Navigator* that deliberately caused rival devices to malfunction (Case IV/30.979 *Decca Navigator Systems*, 21 December 1988).

In the second scenario, the design change must create barriers that hinder rivals from reaching customers through their own means. In the *Microsoft* tying case, for example, Microsoft's tie foreclosed competing media players from access to third-party PC OEMs as a distribution channel. Microsoft therefore prevented rivals from reaching users independently of Microsoft via PC OEMs. The Court found that Microsoft's tie facilitated the 'erection of such barriers for Windows Media Player' (*Microsoft*, paragraph 1088).

Absent a barrier to independent competition, a product improvement should not infringe article 102 TFEU. As Bo Vesterdorf, former president of the General Court, explained in comments on the *Microsoft* judgment: 'a technical development or improvement of ... products is to the advantage of competition and thus to the advantage of consumers' (B Vesterdorf, article 82 EC: 'Where Do We Stand after the Microsoft Judgment?', *Global Antitrust Review*, 2008).

Failure to disclose IP

The Commission has found that an intentional and deceptive failure to disclose relevant IP during a standard-setting process may contribute towards an abuse (Case COMP/38.636 *Rambus* 9 December 2009). This is known as a 'patent ambush'.

In this scenario, the abuse actually constitutes the claiming of royalties for use of the IP after the IP is incorporated in the standard. This is because the company will not hold a dominant position at the time of its failure to disclose IP; it only achieves dominance once the IP is (deceptively) incorporated into the standard.

21 Price discrimination

Unlawful price discrimination under article 102(c) TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions.

Abusive price discrimination requires a number of elements:

- the dominant company must enter into equivalent transactions with other trading parties;
- the company must apply dissimilar conditions to these equivalent transactions (Case C-174/89 *Hoche* ECLI:EU:C:1990:270, paragraph 25);
- if there are legitimate commercial reasons for the discrimination, there is no abuse (Case C-322/81 *Michelin* ECLI:EU:C:1983:313, paragraph 90); and
- the discrimination must place customers at a competitive disadvantage relative to other customers to such a degree that the conduct risks foreclosing equally efficient competitors (Case C-95/04 *British Airways* ECLI:EU:C:2007:166, paragraph 144).

Price discrimination abuses are relatively rare under article 102 TFEU. Price discrimination will generally only be found to be abusive if it is part of a strategy to drive rivals out of the market.

22 Exploitative prices or terms of supply

Exploitative abuses, such as excessive pricing, fall under article 102(a) TFEU. This provides that an abuse may consist of 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

Excessive pricing cases are rare; the leading case is *United Brands*. There, the Court held that a price is excessive if 'it has no reasonable relation to the economic value of the product supplied' (*United Brands*, paragraph 250).

This is assessed by a two-stage test: first, the difference between the dominant company's costs actually incurred and the price actually charged must be excessive; second, the imposed price must be either unfair in itself or when compared to the price of competing products (*United Brands*, paragraph paragraph 251-252; Case COMP/A.36.568/D3 *Port of Helsingborg* 23 July 2004, paragraph 147).

23 Abuse of administrative or government process

Misuse of administrative or government processes may constitute an abuse. In December 2012, the Court of Justice upheld the Commission's decision finding that AstraZeneca had committed an abuse by misusing patent and regulatory procedures to boost its patent protection and exclude new entrants (Case C-457/10 *AstraZeneca* ECLI:EU:C:2012:770).

AstraZeneca's abuse consisted of two elements: First, AstraZeneca submitted false and misleading statements to patent offices in various member states to extend its patent protection for the drug omeprazole. Second, AstraZeneca withdrew market authorisations of certain drugs so that new entrants could not rely on them. Even though this conduct was lawful under the relevant EU Directive, it still constituted an abuse of competition law because it was pursued with an anticompetitive strategy of excluding rivals from the market.

These cases, however, are rare. They would require a clear anticompetitive intent and proof of anticompetitive effects to found any enforcement action.

24 Mergers and acquisitions as exclusionary practices

'Concentrations' (including mergers and acquisitions) with an EU dimension are covered exclusively by the EU Merger Regulation. If applicable national thresholds are met at the member state level, concentrations that do not have an EU dimension are assessed by member state competition authorities.

But this is not to say that acquisitions falling outside the EU Merger Regulation cannot constitute an abuse. In Case AT.39612 *Perindopril (Servier)* 9 July 2014, for example, the Commission investigated a series of acquisitions by Servier of rival technologies – which Servier then did not use – to produce Perindopril. The Commission found that these strategic, blocking acquisitions constituted an abuse of a dominant position under article 102 TFEU.

Finally, if a transaction ultimately results in a dominant position (whether reviewed by the Commission or not), the Commission could later investigate if it suspected the company was abusing that dominance.

25 Other abuses

The categories of abuse under article 102 TFEU are not a closed or exhaustive set. Other abuses found in the past include removing competing products from retail outlets (Case T-228/97 *Irish Sugar* ECLI:EU:T:1999:246); bringing frivolous litigation (Case T-111/96 *ITT Promedia* ECLI:EU:T:1998:183); seeking and enforcing injunctions based on standard essential patents (Case AT.39985 *Motorola* 29 April 2014, Case AT.39939 *Samsung* 29 April 2014 and Case C-170/13 *Huawei* ECLI:EU:C:2015:477); and petitioning for the imposition of anti-dumping duties on rivals (Case T-2/95 *Industrie des poudres sphériques* ECLI:EU:T:1998:242).

New abuses, however, 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.

Also, exclusionary abuses must bring about anticompetitive foreclosure according to the criteria set out in response to question 10. This includes erecting barriers to independent competition; causation; a reasonably likely anticompetitive effect; and creating or reinforcing a dominant position.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

At the EU level, the European Commission is the body with the power to investigate and sanction abuses of dominance. In parallel, national competition authorities of individual member states are competent to apply article 102 TFEU as long as the Commission has not opened a formal investigation on the same matter.

The Commission's primary instrument for investigation is issuing requests for information (including through formal decisions that are subject to penalty payments if the company does not respond), as well as interviews with the company under investigation, complainants and third-party industry participants. The Commission may also conduct unannounced inspections ('dawn raids') at a company's premises, although these are relatively rare in article 102 TFEU cases.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The Commission can impose structural or behavioural remedies, interim measures, fines and periodic penalty payments. 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.

Fines

For infringements of article 102 TFEU, the Commission can impose a fine of up to 10 per cent of a company's total turnover of the preceding business year. The methodology used to calculate the fine is set out in detail in the Commission's Fining Guidelines: the calculation takes it account the nature, length and scope of an infringement; the value of goods or services affected; and whether there are aggravating or mitigating circumstances. The record fine under article 102 TFEU was the €1.06 billion fine the Commission imposed on Intel (currently under appeal).

Remedies

The Commission may impose both structural and behavioural remedies. Structural remedies, however, are only a means of last resort in article 102 TFEU cases when no behavioural remedies are appropriate; they are therefore very rare.

There are two main elements of remedies imposed under article 102 TFEU.

First, the remedy must be appropriate, necessary and proportionate to bring the identified infringement to an end (article 7 of Regulation 1/2003; and Case T-395 *Atlantic Container Line* ECLI:EU:T:2002:49, paragraph 418).

Second, in cases 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' (Case T-24/90 *Automec* ECLI:EU:T:1992:97, paragraph 52; Case T-167/08 *Microsoft* ECLI:EU:T:2012:323, paragraph 95). 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'.

For example, in the *Microsoft* interoperability case, the Commission's decision stated that Microsoft had to disclose interoperability information at reasonable rates. But the decision did not prescribe the precise terms and conditions, and the Commission argued in Court that it did not have the power to make such an order.

Individual sanctions

Individuals may not be fined or sanctioned at the EU level.

Update and trends

The debate over the role of detailed economic analysis in Article 102 TFEU cases will likely continue to play out in the European Courts (see the contrasting opinions of Advocate General Kokott in *Post Danmark II* and Advocate General Wahl in *Intel*). The Court of Justice's ruling in Intel is therefore particularly eagerly anticipated.

Competition Commissioner Vestager has also spoken publicly of the need to address exploitative abuses (which has generally been area of low activity for the Commission). The Commissioner highlighted possible exploitative abuses in the gas industry, in pharmaceuticals and with standard essential patents.

Finally, there is concern among practitioners and agencies that increasing protectionism in national industrial policy may spill over into competition enforcement. In that regard, it is to be hoped that the UK's exit from the EU will not lead to a reversion of formalism in the application of the EU competition rules by member states, and a departure from a purely competition-based assessment in favour of analysis influenced by strategic national industrial concerns.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Commission can impose sanctions directly. If a company appeals a Commission infringement decision and fine, the fine is not suspended pending the appeal. The company may, however, post a bank guarantee and pay the full fine (plus annual interest) if its appeal is unsuccessful.

As to remedies imposed by the Commission, companies may apply for interim suspension of the decision to the General Court pending the outcome of the substantive appeal. The Court will grant interim suspension if the company discloses a prima facie case; demonstrates urgency (which requires serious and irreparable harm if the suspension is not granted); and the balance of interest favours suspension.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The Commission is an active enforcer of abuse of dominance rules in Europe. Since 2010, the Commission has opened roughly 30 abuse of dominance cases, and closed about 10. It has found four infringements in that time. It has roughly 20 cases ongoing.

The average length of proceedings in its closed cases is about three years, although the Commission has a number of open cases that have been ongoing for much longer. The sectors most commonly investigated are utilities, former regulated sectors and technology. The Commission has mainly investigated cases involving alleged exclusionary conduct (across the full spectrum of abuses), although there are some indications it would like to increase its caseload on exploitative abuses (see Update and trends).

The most high-profile ongoing abuse of dominance case is the Commission's investigation of Google's search service. The case is now entering its seventh year. In that time, the case has seen three unsuccessful commitments offers, two Competition Commissioners, over 40 complainants, a European Parliament non-binding resolution to break-up Google and two statements of objection. Over the same period, courts and authorities in the USA, Canada, Taiwan, the UK, Brazil and Germany have opened and completed reviews of Google's conduct (finding no infringement).

The Commission's case has now narrowed 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 results amounts to unlawful favouring.

Google contests the Commission's preliminary concerns. Google explains that it ranks all its results based on consistent relevance standards. The product ads at issue are an enhanced ad format that help users find relevant products, and offer advertisers better conversion rates. Showing ads in clearly marked ad space separate from free results is how Google monetises the free search service it offers to users. And Google has no obligation to show ads from rival services because it is not an essential facility. Google also points to what it considers a thriving product search space, where Amazon (not Google) is the leading player.

The Commission has two other ongoing cases against Google, concerning Google's Android mobile platform and its intermediated ad service, AdSense. The Commission served statements of objections on Google in those cases in 2016. Google responded in late 2016, disputing the allegations.

At the Court level, the Court has ruled on a number of high-profile cases since 2010, including Case C-549/10 *Tomra* ECLI:EU:C:2012:221, Case C-295/12 *Telefónica* ECLI:EU:C:2014:2062, *Intel, Microsoft, AstraZeneca* and *Deutsche Telekom*. The Court has yet to overrule the Commission on substance in an article 102 TFEU case (although note the Advocate General's Opinion in *Intel* advising that the Court of Justice should uphold three of Intel's grounds of appeal, quash the General Court's judgment and refer the case back to the General Court).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Although there is no express equivalent to article 101(2) TFEU for article 102 TFEU, a contractual provision that infringes article 102 TFEU will likely (by analogy with article 101(2)) be void. Provided the infringing provision can be severed from the rest of the contract, the rest of the contract will remain valid (Case 56-65 *Société Technique Minière* ECLI:EU:C:1966:38).

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

At the EU level, all antitrust enforcement is public enforcement by the Commission. Nonetheless, the Commission aims to encourage and facilitate actions brought by private claimants before member state courts. See question 32.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Breaches of competition law are directly actionable in damages claims in member state courts.

In addition, companies can bring follow-on claims before member state courts, where a Commission decision finding an infringement acts as proof of breach. In such claims, the claimant only needs to prove causation and loss.

As to quantum, the Court of Justice established in *Courage v Crehan* (Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465) that a claimant has the right to compensatory damages for harm incurred as a result of the infringement. The Commission has published a Communication on quantifying harm in damages cases, which states that compensation should include the full value of any loss suffered, as well as loss of profit and interest from the time damage was incurred.

The recent Damages Directive, published on 5 December 2014, aims to ensure that victims of competition infringements 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.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Commission decisions can be appealed to the General Court on points of fact and law. The General Court must establish 'whether the evidence relied on is factually accurate, reliable and consistent ... and contains all the information [needed] to assess a complex situation ... [and] is capable of substantiating the conclusions drawn from it' (*Microsoft*, Case T-21/05 *Chalkor* ECLI:EU:T:2010:205, and Case E-15/10 *Posten Norge AS*).

After the General Court appeal, the appeal is to the Court of Justice on points of law only.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Not at the EU level. See question 6.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The rules covering the behaviour of dominant firms under French law are mainly set out in article L. 420-2 paragraph 1 of the French Commercial Code (FCC), which prohibits the abuse of a dominant position by an undertaking or group of undertakings on the domestic market or a substantial part of the market.

The provisions of article 102 of the Treaty on the Functioning of the European Union (TFEU) are applied cumulatively when the abuse of dominant position may affect trade between member states.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article L. 420-2 does not provide for a definition of dominance.

However, the French Competition Authority (FCA) uses the definition retained by the European courts and defines dominance as the position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extend independently from its competitors, customers and ultimately of its consumers.

When assessing dominance, French case law takes into account not only the undertaking's market share but also several other factors such as the market positions of the next largest competitors, the undertaking's reputation, the existence of barriers to entry, the absence of countervailing buying power or the fact to hold a technological lead.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the dominance legislation is to preserve the process of competition in order mainly to protect customers and consumers and also to stimulate innovation, competitiveness, employment and economic growth.

Therefore, according to article L. 420-4 FCC, practices that have the effect of ensuring economic progress, including by creating or maintaining jobs, and reserve for users a fair share in the resulting profit (without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question) are not subject to the provisions of article L. 420-2 and can be granted an exemption (see question 13).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Article L. 420-2 applies to all economic sectors and links have been established between the FCA and French sectoral authorities in order to ensure the complementarity between competition rules and sectoral regulations.

The Regulatory Commission of Energy, the Regulatory Authority for electronic and postal communications, the Regulatory Authority for rail and road activities and the High Council for Audio-visual must therefore refer to the FCA any abuse of dominant position of which they become aware in their sectors, especially if they consider that these practices are prohibited by article L. 420-2, and they can also consult the FCA on any questions falling within its competence.

For its part, the FCA communicates to these authorities any referral concerning their respective sector and requests their opinion on sector-related issues.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules apply to all production, distribution and service activities, including those that are carried out by public persons, in particular in the context of public service delegation agreements (article L. 410-1 FCC).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Article L. 420-2 applies only to dominant firms. Transactions through which firms acquire a dominant position are, in principle, examined through ex ante merger control procedure.

7 Collective dominance

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

Collective dominance is covered by French legislation whose article L. 420-2 prohibits the abuse of a dominant position by a 'group of undertakings'.

Under French case law, such collective dominance is characterised when undertakings collectively hold a position of economic strength that gives them the power to behave to an appreciable extend independently from their competitors, customers and consumers.

In order to determine the existence of collective dominance, the FCA examines:

- firstly, whether the undertakings are united by structural links and have adopted the same course of action on the market;
- alternatively, whether collective dominance may result from the market's oligopolistic structure, by applying the following criteria identified by the General Court in the *Airtours* merger control case (2002):
  - each member of the oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the same policy (market transparency);
  - there must be an incentive not to depart from the common policy on the market (mechanism of retaliation); and

- the foreseeable reaction of current and future competitors and consumers does not jeopardise the results expected from the common policy (lack of competitive pressure from outsiders to the oligopoly).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The prohibition of abuse of dominant position applies to dominant purchasers but the FCA's decisions relating to the subject are very rare.

One example is the FCA's decision finding that cinema operator had abused its dominant position on the upstream market for the purchase of movie performance rights (decision No. 07-D-44 of 11 December 2007 *GIE Ciné Alpes*. Another example is the interim measures decision relating to the photovoltaic electricity sector, where the FCA found that EDF probably enjoyed a dominant position on the electricity-purchase market concerned because of its monopsony position (decision No. 13-D-04 of 14 February 2013).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The FCA defines the relevant product market as the meeting place of supply and demand of certain products or services that are regarded as substitutable and also refers to the Commission Notice on the definition of relevant market, according to which a relevant product market comprises all those products or services that are regarded as interchangeable or substitutable by the consumer.

Principally from the demand side perceptive: to evaluate the degree of substitutability of products or services, the FCA conducts an estimation of their cross-price elasticities by using the 'hypothetical monopolist' test, also called SSNIP test ('small but significant and non-transitory increase in price'), when such data are available (eg, decision No. 16-D-14 of 23 June 2016 *Umicore*); the FCA also carries out a qualitative analysis by taking into account several criteria such as the products' or services' properties, their prices and conditions of use, the characteristics of the offer, etc; and also sometimes from the supply side perceptive (with an evaluation of the market entries possibilities).

The geographic market is defined as the area in which a monopoly power could be exerted effectively without being exposed to the competition of suppliers located in other geographic areas or other goods or services. The FCA also usually refers to the definition of the EU Commission according to which the geographic market comprises the territory on which the undertakings concerned are involved in the supply and demand of product and services, in which the conditions of competition are sufficiently homogeneous and that can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

Even if a market has already been defined in previous merger control cases, the FCA considers that such definition was restricted to these cases and is not necessarily transposable to the abuse of dominance case at hand. The FCA may therefore conduct a new market definition analysis in the context of the dominance investigation and, if necessary, reach a different view on the relevant market (eg, decision No 16-D-14 of 23 June 2016 *Umicore*).

Even though dominance usually derives from the combination of several factors, it follows from French case law that an undertaking whose market share exceeds 50 per cent is presumed to hold a dominant position (decision No. 16-D-14 of 23 June 2016 *Umicore*).

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article L. 420-2 provides no definition of abuse but specifies (by referring to article L. 420-1) that the abusive exploitation of a dominant position is prohibited when it has as an object or may have as an effect to prevent, restrict or distort competition on the market and sets the following non-exhaustive list of examples of abuses: refusal to sell, tie-in sales, discriminatory selling conditions and termination of established commercial relationships solely on the ground that the partner refuses to comply with unjustified commercial conditions.

While some practices are presumed to be abusive, no conduct is subject to an absolute per se prohibition with the FCA preferring to conduct a case-by-case analysis of the object and actual or potential effects of the alleged abusive practice and the potential grounds for exemption.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Article L. 420-2 FCC prohibits both exploitative and exclusionary practices, even though cases relating to exclusionary practices are more common.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

A causal link must be demonstrated between the dominant position and the abuse of that position.

However, article L. 420-2 may apply even if the abuse takes place on an adjacent market to the dominant market provided that (i) close associated links are demonstrated between the dominant and the related markets, and (ii) a link exists between the position held on the dominant market and the practice observed on the related market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

According to article L. 420-4 FCC, the following abusive practices are not subject to the provisions of article L. 420-2 and may benefit from exemption:

- abusive practices that result from the application of a statute or a regulation adopted for its implementation;
- abusive practices for which the authors can prove that they have the effect of ensuring economic progress (including by creating or maintaining jobs) and that they reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question; and
- certain categories of agreement or certain agreements which are recognised as meeting the above conditions by decree (in particular when their object is to improve the management of small or medium-sized undertakings).

However, individual exemptions are seldom granted by the FCA and the requirement to not eliminate competition on the market makes it difficult in practice for an exclusionary practice to meet the exemption conditions.

Specific forms of abuse

14 Rebate schemes

The FCA has recently referred to the EU case law to divide rebate schemes granted by a dominant undertaking in three categories (decision No. 16-D-11 of 6 June 2016 TDF):

- quantity rebates, linked exclusively to the volume of purchases from the dominant supplier, which do not usually fall under the scope of article 420-2 FCC because they are deemed to reflect efficiency gains of the dominant undertaking;
- fidelity rebates that are presumed to have a foreclosure effect (in its decision No. 15-D-20 of 17 December 2015, the FCA imposed a €350 million fine to the telecommunications company Orange, in particular for putting into place an elaborate fidelity rebate scheme); and
- 'intermediary rebates' whose validity is assessed only on a case-by-case basis.

15 Tying and bundling

Tying sales are listed by article L.420-2 as an example of abusive conduct.

In accordance with the EU Commission Guidelines on abusive exclusionary conduct, the FCA stated that such conduct may be prohibited where an undertaking is dominant in the tying market and where, in addition, the tying and tied product are distinct products and the tying practice is likely to lead to anticompetitive foreclosure.

According to the FCA, pure bundling (where the products are only sold jointly) is, in principle, abusive when the tying product is essential, whereas the effects of mixed bundling are less harmful (Opinion 10-A-13 of 14 June 2010 relating to the cross-use of customers' databases).

In its commitment decision No. 14-D-09 of 4 September 2014, the FCA held in its preliminary assessment that Nespresso was likely to have abused its dominant position by adopting technical and commercial measures aiming at tying the sale of its coffee machines to its own capsules.

16 Exclusive dealing

To assess whether exclusive dealing arrangements entered into by dominant undertakings are likely to lead to a foreclosure effect, the FCA takes into account several factors, such as the scope of the exclusive obligation, its duration, its technical or economic justification, the economic compensation given to the customer and the market positions of the competitors.

In its Decision No. 16-D-14 of 23 June 2016, the FCA considered that the exclusive purchasing obligations of the Belgian group Umicore, a dominant supplier on the coated zinc covers and zinc rainwater drainage products markets in France, aimed at excluding competitors from the market.

17 Predatory pricing

In order to determine whether a dominant undertaking has abused its dominant position by its low-price policy, French case law usually applies the *Akzo* test and the EU Commission's Guidelines on abusive exclusionary conduct, according to which:

- prices above average total costs for a single product undertaking or average incremental costs for a multiproduct company are not presumed to be predatory;
- prices below average avoidable costs must, in principle, be regarded as abusive; and
- prices below average total or incremental costs but above average avoidable costs must be regarded as abusive if the prices are part of a plan for eliminating competitors.

The Paris Court of Appeal has recently recalled these principles in its *Direct Energie/Engie* judgment (28 July 2016, No. 2016/11253).

It should be noted that although predatory pricing has traditionally been defined by French case law as occurring when a dominant undertaking sets its prices at a level where it deliberately incurs losses or sacrifices short-term profit with the purpose of eliminating or discrediting its competitors and the intention of later raising its prices in order to recoup its losses, the Paris Court of Appeal recently stated that the possibility of recoupment was not a constituent element of predation even though the impossibility of recoupment could be raised as a defence (judgment *Google/Evermaps* of 25 November 2015 12/02931).

18 Price or margin squeezes

Price (or margin) squeeze occurs where a vertically integrated firm holding a dominant position on the upstream market charges prices on the upstream market which, compared to the prices it charges on the downstream market, do not allow an equally efficient competitor to operate profitably and on a lasting basis on the downstream market.

According to the FCA, a price squeeze has an anticompetitive effect when an equally efficient competitor can only enter the market by suffering losses and such effect can be presumed when the services provided by the dominant undertaking to its competitors are essential for them to compete against it on the downstream market.

In its assessment of a price squeeze, the FCA conducts a test comparing the difference between the revenues generated on the downstream market by the dominant undertaking and the costs incurred on this same market with the wholesale price it invoiced to its competitors for the access to the intermediary good (eg, decision No. 15-D-10 of 11 June 2015 TDF).

19 Refusals to deal and denied access to essential facilities

The FCA applied the essential facilities doctrine for the first time in 1996 in its decision *Héli-Inter Assistance* (decision No 96-D-51 of 3 September 1996) and has since defined the cumulative conditions under which denying access to an essential facility is considered an abuse of a dominant position (in particular, Opinion No. 02-A-08 of 22 May 2002 *Association pour la promotion de la distribution de la presse* and, more recently, decision No. 14-D-06 of 8 July 2014 *Cegedim*):

- the essential facility is controlled by a dominant undertaking;
- access to the facility is necessary or essential to compete with the dominant undertaking on an upstream, downstream or adjacent market;
- the competitor is unable to reasonably duplicate the essential facility;
- the use of the facility is denied or granted under restrictive and unjustified conditions; and
- access to the facility by competitors is feasible.

Even in the absence of such essential facility, a refusal to supply can constitute an abuse, in particular if:

- the refusal relates to a product or service which is necessary to be able to compete on an adjacent market;
- the refusal is likely to eliminate all effective competition on the adjacent market;
- the refusal is likely to prevent the undertaking requesting supply from bringing innovative goods or services to the market; and
- the refusal cannot be legitimately justified.

20 Predatory product design or a failure to disclose new technology

Product innovation can, in certain circumstance, be considered as predatory.

For example, in its commitment decision No. 14-D-09 of 4 September 2014, the FCA found that the several technical changes made by Nespresso to its coffee machines affected the compatibility of competing capsules. Therefore, this series of product design changes was likely to infringe article 420-2 by tying the sale of the Nespresso coffee machines to its own capsules.

21 Price discrimination

Discriminatory selling conditions are expressly covered by article L. 420-2 and price discrimination may be found abusive by the FCA in two cases (eg, decision No. 13-D-07 of 28 February 2013 *E-kanopi*):

- when the discrimination has as an object or may have as an effect the exclusion of a competitor by artificially strengthening the dominant undertaking on the dominant market or another market (exclusionary abuse); and
- when the dominant undertaking artificially provides its customers with an advantage or disadvantage on their own market by unjustified difference in treatment (exploitative abuse).

In its decision No. 15-D-17 dated 30 November 2015, the FCA fined SFR for abusive price discrimination between its on-net and off-net phone calls on mobile services for non-residential customers markets of La Réunion and Mayotte insofar as this practice made an increase in competition more difficult on these markets.

22 Exploitative prices or terms of supply

An excessive price may be an exploitative abuse if (i) there is a lack of proportionality between the price of the product or service and the production cost or service value or (ii) this price seems to be excessive compared to those of undertakings in a similar situation (unless there is an economic justification). Cases relating to these kinds of practices are relatively rare.

Practices limiting the commercial freedom of the dominant undertaking's economic partner (such as unilateral limitation of liability clause) may also be considered exploitative.

In a recent exploitative abuse case, the FCA recognised Google's right to freely define its AdWords contents policy but, however, found

Update and trends

No changes in French legislation are expected this year.

It should be noted that in the past years the FCA has shown interest in the competitive issues related to (i) ecosystems in a joint study with the UK Competition and Markets Authority of 2014 entitled 'The economics of open and closed systems' (ecosystems being defined in the study as a system where a number of firms work together to create a new market and produce goods and services of value to customers and which combines a platform and the multiple sides of the market that it intermediates between such as consumers, component producers, developers, etc) and (ii) the possession and use of data in a joint study with the German Bundeskartellamnt of May 2016 entitled 'Competition Law and Data'.

that Google was likely to have abused its dominant position on the French search advertising market by implementing this policy in a non-objective, non-transparent and discriminatory way (decision No. 15-D-13 of 9 September 2015).

23 Abuse of administrative or government process

According to the FCA, a dominant undertaking is entitled to use legal and administrative proceedings to defend its interests. As a result, the mere fact that a dominant undertaking lodges patents and introduces legal recourse in order to protect its intellectual property rights cannot, in itself, be deemed as abusive.

However, a legal action can, exceptionally, be characterised as an abuse (eg, decision No 11-D-15 of 16 November 2011 *Sogarel*) if it is:

- manifestly without foundation (and cannot reasonably be considered as an attempt to assert the dominant undertaking's rights); and
- part of a plan aiming at preventing, restraining or distorting competition on the market.

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are assessed under merger control rules and the FCA has not, to the best of our knowledge, ruled on whether such transactions could be regarded as abusive (which could potentially be the case when the merger control rules are not applicable).

It should be noted that, in the event of an abuse of a dominant position, the FCA may enjoin the undertakings involved to amend, supplement or cancel all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out, even if these acts have already been subject to the merger control procedure (article L. 430-9 FCC).

25 Other abuses

No comprehensive list of potentially abusive conduct can be provided.

The other practices that may fall under the prohibition of article L. 420-2 include, in particular, termination of established commercial relationships on the sole ground that the partner is refusing to accept unjustified commercial conditions (listed as an example of abuse by article L. 420-2) or acts of defamation when a link is established between the defamation and the undertaking's dominant position, resulting generally from the undertaking's reputation or the confidence it enjoys from the market participants (conviction decisions No. 13-D-11 of 14 May 2013, *Sanofi* and No. 16-D-11 of 6 June 2016 *TDF*).

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The French authority responsible for the public enforcement of the dominance rules is the FCA which has decision-making power over abuses of dominant cases and also enjoys power of investigations.

In order to assess whether a practice falls within the scope of article L. 420-2, the officials of the FCA's investigation services are authorised to carry out two types of inquiries:

- in a 'simple' investigation, the officials may access all premises or means of transport for professional use and places of performance of services, require communication and take copies of books, invoices and all other professional documents and also collect any necessary information, proof or justification; and
- in the context of investigations requested by the EU Commission, the Ministry of economy or the FCA's general rapporteur and authorised by judges, these officials may conduct inspections at any premises, seize documents and any information medium and place any commercial premises, documents and information media under seal for the duration of the inspection of those premises.

It should be noted that the French Ministry of economy has the power to issue injunctions and to offer settlement when the abusive practices only affect a local market and do not concern facts covered by article 102 TFEU, on condition that the turnover generated in France by each of the undertakings concerned during the last financial year does not exceed €50 million and that their aggregate turnover does not exceed €200 million.

Moreover, the French commercial, civil and administrative courts are responsible for the private enforcement of the dominance rules (see questions 31 and 32) and the criminal courts also have jurisdiction to impose criminal sanctions to individuals (see question 27).

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The FCA is notably empowered to:

- order the dominant undertaking to cease its abusive practices within a specified period of time;
- impose special conditions and enjoin the undertakings involved to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse of dominant position has been carried out or, if the dominant undertaking operates retail outlets, require that it should proceed with divestment of assets;
- accept the dominant undertaking's behavioural or structural remedies to end the competition concerns; and
- impose a financial penalty (either immediately or in the event of non-compliance with the conditions imposed or the remedies accepted).

The maximum amount of the financial penalty that may be imposed is:

- for a company: 10 per cent of the highest worldwide turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented (if the accounts have been consolidated or combined, the turnover taken into account is that shown in the consolidated or combined accounts); and
- for other entities: €3 million.

The financial penalties shall be proportionate to the seriousness of the abuse, the damage to the economy, the situation of the dominant undertaking and the possible repetition of the practices.

When the dominant undertaking does not contest the allegations made against it in the statement of objections, the general rapporteur of the FCA may submit a settlement offer fixing the minimum and the maximum amounts of the contemplated financial penalty. If the dominant undertaking agrees to modify its conduct in the future, the general rapporteur may take this commitment into account in its settlement submission.

The highest fine ever imposed for an abuse of dominance was the €350 million fine pronounced by the FCA in 2015 against Orange, a French telecommunications group, in particular for putting into place fidelity rebate schemes in the electronic communications sector (Decision No. 15-D-20 of 17 December 2015).

Besides the financial penalty, a natural person who has fraudulently taken a personal and decisive part in the design, organisation or implementation of abusive practices may be punished by a prison sentence of four years and a fine of €75,000 (article L. 420-6 FCC).

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The FCA is empowered to impose sanctions directly to the abusive undertakings without petition a court or another authority (article L. 464-2 FCC).

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The FCA issues each year several decisions relating to abusive practices. The processing of a case by the FCA takes on average 18 months after the lodging date of the complaint, but abuse of dominance cases may take longer.

The abuses which have been most commonly prosecuted in recent years are exclusionary practices such as predatory pricing, rebates schemes, refusals to deal and denied access to essential facilities, defamation and discrimination.

In 2016, the FCA sentenced the Belgian group Umicore with a €69.2 million fine for abusing its dominant position on the coated zinc covers and zinc rainwater drainage products markets in France by imposing exclusive purchasing obligations aimed at excluding its competitors from the market (decision No. 16-D-14 of 23 June 2016).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Any agreement or contractual clause referring to a practice prohibited by article L. 420-2 is invalid (article L. 420-3 FCC). This nullity may be declared by the courts having jurisdiction.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

French law does not provide a basis for a court or other authority (except the FCA, see question 27) to order a dominant firm to grant access, supply goods or services or conclude a contract, but private enforcement is possible for customers and consumers before French courts having jurisdiction in order to obtain compensation from the dominant undertaking or the invalidity of an agreement or contractual clause referring to a practice prohibited by article L. 420-2.

The plaintiff can bring either a follow on or stand-alone action (depending on whether the alleged abuse has already been the subject of an infringement decision of the FCA or not).

To date, there have only been a few cases of actions for damages brought before French courts for abuses of dominance but the number of private enforcement actions is expected to increase in the future with the transposition into French law of Directive 2014/104 of 26 November 2014 on antitrust damages actions aiming at removing practical obstacles to compensation for victims of infringements of antitrust law.

Moreover, a system of class action has been introduced in French law in 2014, but its scope of application is restricted to consumers (article L. 623-1 of the French Consumer Code).

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices have a claim for damages before the national civil and commercial courts on the basis of French tort law, which requires the demonstration of a fault, a damage and a causal link between them. The burden of proof falls upon the claimant.

Damages are assessed by the judge on a case-by-case analysis, on the basis of the entire injury suffered by the plaintiff, and aim at compensating any kind of direct and certain damage (material loss, moral loss, loss of chance, etc).

For example, in 2012, the Paris Court of Appeal found that the dominant telecommunications group France Telecom had abusively restricted market access possibilities and therefore granted a €7 million compensation to one of its potential alternative competitors for loss of chance (judgment of 11 December 2012 No. 11/03000).

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The FCA's decisions finding an abuse may be appealed to the Paris Court of Appeal, which has sole jurisdiction in this matter, in order to obtain either the annulment of the decision or its reformation.

If the Paris Court of Appeal annuls the FCA's decision without annulling the prior proceedings, the Court is required to review both the facts and the law. By contrast, if the Court annuls the decision for insufficient investigation, the case may be referred to the FCA for additional investigations.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

French law provides several rules applying to the unilateral conduct of non-dominant firms, which include the prohibition of:

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- the abusive exploitation of the state of economic dependency of a client or supplier if it is likely to affect the functioning or the structure of competition (article L. 420-2 paragraph 2 FCC);
- price offers or selling prices to consumers that are excessively low compared with production, processing and marketing costs if they have as an object or may have as an effect to eliminate an undertaking or one of its products from the market or to prevent it from accessing a market (article L. 420-5 FCC) and the resale of a product in the same condition at a lower price than its effective purchase price (article 442-2 FCC); and
- the imposition of a minimum resale price or trade margin (article L. 442-5 FCC).

Moreover, the liability of an undertaking may be engaged in cases of restrictive practices such as obtaining from a commercial partner any advantage that is clearly disproportionate compared with the value of the service provided or obviously abusive terms concerning prices or sale conditions under threat of a brutal termination of their business relationships (a list of these restrictive practices appear in article L. 442-6 I FCC).

Germany

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Unilateral conduct by undertakings with market power is governed by sections 18, 19 and 20 of the German Act against Restraints of Competition (ARC), which prohibit (i) an undertaking's abuse of a (single-firm or collective) dominant position, and (ii) specific types of abusive behaviour by undertakings that have 'relative' market power as compared to small or medium-sized enterprises (as trading partners or competitors). Germany has therefore made use of the possibility provided for under EU Regulation 1/2003 to enact national legislation on unilateral conduct that is stricter than article 102 of the Treaty on the Functioning of the European Union (TFEU).

Another distinct feature of German law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance (see answer to question 2). The case law of the German Federal Cartel Office (FCO) and the German courts, notably the Federal Court of Justice (FCJ), provide guidance on the application of these presumptions and rules. The only source of formal general guidance on unilateral conduct is the FCO's – somewhat dated – notice on below-cost pricing (which is currently under review by the FCO).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Under section 18(1) ARC, single-firm dominance exists where an undertaking (i) does not have competitors, (ii) is not exposed to significant competition, or (iii) has a 'superior market position' as compared to its competitors (which can exist even if there is significant competition in the market) on a particular market. The FCO's merger control guidelines (the principles of which can also be applied to unilateral conduct cases) define single-firm dominance broadly consistently with the EU standard, namely as a situation in which an undertaking's market power enables it to act without sufficient constraints from its competitors (ie, a situation in which an enterprise is able to act to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, consumers (FCO, Guidance on Substantive Merger Control of 29 March 2012, para. 9)).

As per section 18(3) ARC, the following (non-exclusive) criteria may be taken into account in assessing whether a company has a 'superior market position': the enterprise's market share, its financial resources, its access to input supplies or downstream markets, its affiliations with or links to other enterprises, legal or factual barriers to market entry, actual or potential competition by domestic or foreign enterprises, its ability to shift its supply or demand to other products, or the ability of the undertaking's customers or suppliers to switch to other suppliers or customers.

In this respect, a somewhat static appraisal of market shares is still the most important factor in the FCO's and courts' analysis. In particular, section 18(4) ARC sets forth a (rebuttable) presumption of potential dominance where an undertaking's market share exceeds 40 per cent. An undertaking, however, may also be found dominant (exceptionally) if its market share remains below the presumption threshold. If a company's market share exceeds the presumption threshold, it is in practice often difficult (but not impossible) to rebut the presumption with economic arguments. This is 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.

See question 7 for the definition of collective dominance and the answer to question 34 on the definition of relative dominance.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The main purpose of the ARC is to prevent restrictions of competition. While other objectives may be taken into account if they are directly related to this main objective (eg, consumer welfare, efficiencies and in particular the protection of small or medium-sized undertakings as customers or competitors), German competition law does not take into account social or political goals in the assessment of potential abuses of dominance (such as labour market considerations) (see section 30 ARC and the response to question 30; note, however, that the FCO has, so far, only slowly started to adopt the more sophisticated economic analyses used by the European Commission, and still continues to consider market shares as very important in its analysis).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Special rules apply to certain regulated industries, such as energy (electricity and gas), telecommunications, postal services and railways (most of these sectors have been liberalised only within the last few decades). The Federal Network Agency (FNA) monitors compliance with certain of these regulations in cooperation with the FCO.

Energy sector

Under section 29 ARC, dominant energy suppliers may not (i) demand fees or other business terms which are less favourable than those of other energy suppliers or enterprises on comparable markets, or (ii) demand fees which unreasonably exceed their own costs. Note, however, that section 29 ARC will only apply until 31 December 2017, because the German legislator considered its special rules to be necessary only for a transitional post-liberalisation period. Outside the ARC, sections 20 et seq of the Energy Industry Act (EnWG) oblige dominant energy network operators to grant other enterprises access to their electricity or gas grids on the basis of objective and non-discriminatory criteria. The EnWG also includes rules that are similar to sections 19 and 20 ARC (in section 30 EnWG).

Telecommunications sector

The Federal Telecommunications Act provides a detailed regulatory framework for the telecommunications market, taking into account in particular the role of incumbent telecommunication companies that have significant market power on particular pre-defined telecommunications markets. The FNA observes the implementation of these

sector-specific regulatory rules and may in particular impose remedies to regulate the conduct of enterprises with significant market power, which may go as far as requiring the separation of the incumbent provider's service and network operations into independent legal entities.

Postal services
The FNA may also issue prohibition decisions against enterprises that are dominant in any market for postal services. In particular, dominant enterprises may be required to perform 'partial services' for competitors, ie, take over specific parts of the mail delivery for them, on non-discriminatory terms.

Railway sector
According to the German General Railway Act, all 'railway infrastructure enterprises' may have to grant access to their railway infrastructure, effectively irrespective of their market position. It also authorises the FNA to issue decisions specifically prohibiting railway infrastructure enterprises from impairing the right of 'non-discriminatory use of the railway infrastructure'.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The German dominance rules apply to all (dominant) enterprises, including all natural and legal persons engaging in economic activities. No special rules apply in Germany to the public sector or state-owned enterprises. Section 130(1) 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.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The ARC does not prohibit an enterprise's attempt to become dominant per se (ie, as long as the enterprise strengthens its market position without otherwise infringing the antitrust laws). In this context, section 20 ARC is particularly relevant – the prohibition may apply to enterprises that have not yet obtained a dominant market position, but attempt to use their 'superior market power' in relation to small or medium-sized competitors or customers by exclusionary or discriminatory conduct in order to further strengthen their market position.

7 Collective dominance

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

Collective dominance is covered by the German dominance rules. Under section 18(5) ARC, two or more undertakings with paramount market positions are dominant where no substantial competition exists between them and where they jointly are not constrained sufficiently by competition from third parties. Section 18(6) ARC provides market share-based legal presumptions for collective dominance: Three or fewer companies are presumed to be collectively dominant if they enjoy a combined market share of at least 50 per cent; alternatively, five or fewer companies are presumed to be collectively dominant if they account for a combined market share of at least two-thirds. These presumptions can be rebutted by the companies by showing that substantial competition exists between them individually, or that they are jointly sufficiently constrained by competitors (or customers; although disproving the presumption is typically difficult in practice).

German courts have so far rarely addressed collective dominance issues outside of merger cases. The case law on collective dominance is increasingly influenced by the European Court of Justice (ECJ) and European Commission case law and legislation, and the FCO's merger control guidelines accordingly define collective dominance as companies in an oligopolistic setting engaging in tacit coordination or collusion with the result that they effectively do not compete with one another (FCO, Guidance on Substantive Merger Control of 29 March 2012, paragraph 81).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The ARC's rules regarding abusive unilateral conduct generally apply equally to both dominant suppliers and purchasers. However, section 19(2) No. 5 ARC prohibits a specific type of abuse that is particularly relevant for dominant purchasers: a prohibition on a dominant undertaking using its dominant market position 'to invite or cause other undertakings to grant it advantages without objective justification' (note, however, that German courts have, so far, been very reluctant to find that a dominant purchaser indeed abused its market position by asking suppliers for advantages, such as special rebates; see in particular the decision of the FCJ in *Konditionsanpassung*, 24 September 2002, and the decision of the Düsseldorf Court of Appeal in *Hozeitsboni*, 18 November 2015).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Relevant product market
The FCO defines relevant product markets primarily based on demand-side substitutability considerations, such as the relevant products' intended use, characteristics and price. In some cases, the FCO has 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 (eg, decisions of the FCO in *ÖPNV-Hannover*, 12 December 2003, and in *Loose/Poelmeyer*, 2 July 2008; decision of the FCJ in *Soda-Club II*, 4 March 2008). Under certain circumstances supply-side substitution (ie, other manufacturers being able and willing to adjust their production within a short time and without significant cost) may also be relevant (eg, decision of the FCJ in *National Geographic II*, 16 January 2007). In particular with respect to retail markets (ie, the usual product range of a retailer may be considered to form a single market), portfolio markets have been accepted.

Relevant geographic market
The FCO's starting point for geographic market definition is demand-side substitutability. As under EU law, the relevant geographic market 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 (decision of the FCJ in *Melitta/Schultink*, 5 October 2004).

In practice, the FCO will tend to take a somewhat narrower view on market definition in ex post behavioural enforcement (such as in dominance cases) than in merger control cases, as the perspective of specific customers or competitors potentially harmed by the conduct at issue may sometimes influence the FCO's assessment.

Regarding the rebuttable presumption of dominance and the thresholds applicable in this context under German law, see questions 2 and 7.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 19(1) ARC prohibits the 'abuse of a dominant position.' This general prohibition does not include a precise legal definition of the term 'abuse'. Instead, section 19(2) ARC provides for five non-exhaustive examples of prohibited abusive behaviour (exclusionary conduct, discriminatory behaviour, exploitative abuses, structural abuse and refusal of access). Section 20 ARC extends the prohibition to exclusionary and discriminatory behaviour by enterprises that are dominant only in 'relative terms' by enjoying relative market power with respect to small or medium-sized undertakings (see questions 1, 6 and 34).

At least in theory, there are no per se abuses of dominance. While all relevant unilateral conduct may – theoretically – be justified, the

FCO, as a practical matter, will not generally conduct an in-depth economic effects analysis in order to establish a prima facie abuse, but only determine whether the conduct at issue may be categorised in broad terms as abusive. It is then up to the companies concerned to provide an objective justification for their conduct, eg, cost efficiencies as justification for rebates.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. German antitrust law prohibits exclusionary conduct (section 19(2) No. 1 ARC), notably including predatory pricing and offers below cost, as well as exploitative abuses (section 19(2) No. 2 ARC), notably 'imposing prices or other trading conditions that differ from those likely to exist on a market with effective competition'.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The FCO does not need to prove that an enterprise's dominant market position actually enabled it to conduct its abusive behaviour to establish an infringement under sections 19 and 20 ARC, ie, no strict causal link between the existence of the dominant position and the abusive measure is necessary. But a dominant position in a specific market must be the position that is being abused. With respect to adjacent markets, abusing a dominant position in one market by leveraging it into another market (eg, through anticompetitive tying or bundling) is prohibited.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

As per the answer to question 10, unilateral behaviour may in principle always be objectively justified by means of a comprehensive analysis of all relevant circumstances and a balancing of the conflicting interests. However, the burden of proof with respect to an objective justification lies with the dominant company (ie, it must show that its behaviour was justified by an overriding interest outweighing the interest of companies affected by the conduct (see section 20(4) ARC)).

Specific forms of abuse

14 Rebate schemes

As rebates can often provide lower prices to customers and enhance competition, dominant undertakings are not generally prohibited from granting them. This is the case, in particular, for volume-based and functional rebates (granted for specific services that the business partner provides; 'pay for performance') if they reflect cost savings connected to economies of scale, and are applied in a non-discriminatory fashion. In contrast, dominant undertakings may, as a general rule, not grant rebates that create an incentive for customers to purchase their entire, or close-to entire, demand of products or services exclusively from the dominant enterprise, thereby foreclosing competitors. This may be the case in particular with respect to the following types of rebates:

- 'loyalty rebates' (ie, given under the condition that the customer purchases its entire demand or, at least, a significant portion of it from the dominant supplier);
- 'retroactive rebates' (ie, rebates that are granted retroactively if a customer has exceeded a specific purchasing threshold and therefore have a loyalty enhancing effect); and
- product range-related rebates' (ie, rebates that are only granted if the customer purchases the entire product range from one supplier).

15 Tying and bundling

German antitrust law prohibits dominant enterprises from using their market power on one market to leverage their position onto other (neighbouring) markets in which they do not enjoy a dominant position, regardless of whether this occurs via contractual or economic tying or bundling (see, for instance, the judgments of the FCO in *Der Oberhammer*, 30 March 2004, and in *Strom und Telefon*, 4 November 2003). These types of behaviour might in principle be justifiable by special requirements (eg, technical reasons), or if the practice is limited to a short period of time and only intended to provide customers with an incentive to try out the tied product.

16 Exclusive dealing

Dominant undertakings may, in principle, employ exclusivity agreements, but are subject to more stringent restrictions than non-dominant companies in this respect. While the use of exclusivity clauses is therefore not per se prohibited, the interests of the dominant undertaking, the company bound by the exclusivity clause and third parties (in particular alternative suppliers) must be considered and balanced carefully (as with respect to section 1 ARC/article 101 TFEU). Important factors in this analysis include the term and scope of the exclusivity clause. The Düsseldorf Court of Appeal has found an exclusivity clause requiring the customer to procure 50 per cent of its demand for a period of four years from the dominant enterprise to be abusive (judgment of the Düsseldorf Court of Appeal in *E.ON Ruhrgas*, 20 June 2006).

17 Predatory pricing

Strategies aimed at driving competitors out of the market or at increasing market entry barriers by lowering prices (predatory pricing) are in general prohibited as exclusionary conduct falling under sections 19 and 20 ARC. However, the case law suggests limited practical relevance of this prohibition – with the exception of cases concerning sales below cost (see the decision of the FCO in *Lufthansa/Germania*, 19 February 2002). In this respect, pursuant to section 20(3) sentence 2 No. 2 ARC, dominant trading companies may not – except occasionally or with objective justification – sell products below the price for which they themselves bought those products. Promotions lasting more than three weeks may not be considered merely 'occasional'. With regard to the food retail space, section 20(3) sentence 2 No. 1 ARC prohibits even occasional unjustified offers below cost. The (somewhat dated) FCO notice on below-cost pricing provides some guidance on which costs are relevant for the assessment of exclusionary below-cost pricing (although this notice is currently being considered for revision by the FCO).

18 Price or margin squeezes

A price or margin squeeze occurs if a vertically integrated dominant enterprise sells products to its downstream competitors at a (wholesale) price that is either higher than the price that it charges itself on the downstream market, or so high that its downstream competitors are left with a profit or margin that is too small to effectively compete with the dominant enterprise's product on the downstream market (the relevant question is whether the margin between the dominant undertaking's wholesale price on the upstream market and its retail price on the downstream market would suffice for the dominant undertaking to operate profitably on the downstream market, decision of the FCO in *MABEZ-Dienste*, 6 August 2009).

Under section 20(3) No. 3 ARC (in force only until 31 December 2017), such behaviour is expressly prohibited for vertically integrated undertakings with relative market power with respect to small or medium-sized undertakings. However, the same prohibition applies to all enterprises that are dominant within the meaning of section 19 of the ARC either on the upstream market or on both the upstream and the downstream market (the FCO considers dominance on the upstream market to be sufficient, but will scrutinise the dominant enterprise's behaviour more closely if it is also dominant on the downstream market), irrespective of the size of the affected competitors. The FCO has investigated potential margin squeeze issues in particular in petrol (station) markets (see, eg, decision of the FCO in *Freie Tankstellen*, 9 September 2000; judgment of the Düsseldorf Court of Appeal in *Freie Tankstellen*, 13 February 2002).

19 Refusals to deal and denied access to essential facilities

According to section 19(2) No. 4 ARC, an abuse may also occur if a dominant enterprise refuses to grant another enterprise access to its network or other infrastructure facilities entirely, or only in exchange for unreasonably high fees, if the facility constitutes an essential

facility (without access 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). Access to an essential facility may, however, be refused if the joint use is impossible for legal reasons, eg, a necessary public authorisation is not granted. Where the possibility of joint use of an essential facility by both parties is unclear, the dominant enterprise bears the burden of proof.

20 Predatory product design or a failure to disclose new technology

Product design: A dominant company's product design has only been found to be abusive in exceptional circumstances. This has been the case where the design had no value in itself, but was only intended to exclude competition (ie, where a design had been introduced solely to render rivals' products incompatible or to exclude rivals from the market). Another scenario in this respect might be a dominant company using its product design to create barriers that hinder rivals from reaching customers through their own means (however, there is no specific German case law on this subject).

Failure to disclose new technology: German courts have found that the intentional and deceptive failure to disclose intellectual property rights (essential patents) during a standard-setting procedure might lead to an abuse ('patent ambush'). An abuse, however, occurs only if an undertaking actually claims royalties for the use of the intellectual property after the intellectual property is incorporated in the standard. This is because the undertaking does not hold a dominant position at the time of its failure to disclose, but only achieves dominance once its intellectual property is (deceptively) incorporated into the standard (see, for instance, the judgment of the Regional Court of Düsseldorf in *MPEG 2-Standard*, 30 November 2006, where the court, however, ultimately did not find an abuse).

21 Price discrimination

According to section 19(2) No 3 ARC, a dominant undertaking may not apply different prices (or business terms) to customers that are active in the same market, unless there is an objective justification for the differentiation (ie, in particular if the differentiation becomes arbitrary and is solely based on non-economic considerations). In contrast, a distinction in pricing or terms between separate markets may be justified more easily, in particular if the distinction is necessary for the dominant undertaking to enter a new market.

In Germany, there is no other legislation regarding price discrimination outside the (absolute and relative) dominance rules pursuant to sections 18-20 ARC.

22 Exploitative prices or terms of supply

Under section 19(2) No. 2 ARC, an enterprise abuses its superior market power if it demands prices or other business terms which exceed those prices that would have applied if effective competition existed. The provision explicitly provides that the dominant enterprise may be a supplier or purchaser. However, in both cases, the difference between the hypothetical prices or business terms and the actual prices or business terms must be significant (judgment of the FCJ in *Valium*, 16 December 1976). In order to determine which prices or business terms would have applied hypothetically on a competitive market, the situation on other comparable markets with effective competition are taken into account.

Exploitative abuses may further arise under the more general provision of section 19(1) ARC. In particular, an extreme difference between production costs and revenue are regarded as an indication of such prohibited exploitative conduct (judgment of the FCJ in *Netznutzungsentgelt*, 18 October 2005, and decision of the FCJ in *Wasserpreise Calw*, 15 May 2012).

23 Abuse of administrative or government process

Misuse of administrative or government processes may constitute illegal abusive behaviour. For instance, the FCJ found in 2009 that not only the refusal to grant a patent licence, but also the dominant patent holder's exercise of its right to obtain an injunction before a court may constitute an abuse of market power. However, the Court held that the latter conduct would only amount to an abuse of dominance if the patent user previously made an unconditional offer to the patent holder to conclude a licence contract (i) to which the patent user abided already in using the intellectual property, and (ii) which the patent holder was not allowed to reject (FCJ in *Orange Book Standard*, 6 May 2009).

Since then, several German courts have had to decide whether participants in a standardisation procedure who committed to grant licences on fair, reasonable and non-discriminatory (FRAND) terms are prohibited under the antitrust laws from seeking injunctions against users of their standard essential patents. While most German courts initially made the use of the FRAND compulsory licencing defence for the patent users subject to very strict requirements, the Düsseldorf District Court (decision in *Huawei/ZTE*, 21 March 2013) ultimately referred one case to the ECJ. In its judgment of 16 July 2015, the ECJ specified the conditions under which the seeking of an injunction is not abusive (*Huawei/ZTE*, 16 July 2015) and German courts have subsequently applied these criteria in a number of cases (decisions of the Düsseldorf District Court, 3 November 2015; and of the Düsseldorf Court of Appeals, 13 January 2016).

24 Mergers and acquisitions as exclusionary practices

Since concentrations that would result in the creation or strengthening of a dominant position may not be cleared by the FCO according to section 36(1) ARC in the first place, exclusionary conduct relating to mergers and acquisitions has, so far, not been addressed in the context of dominance cases in Germany.

25 Other abuses

The general provision in section 19(1) ARC does not focus on specific types of behaviour, but prohibits abuse of dominance in any form. In the same vein, the examples of abusive behaviour provided in sections 19 and 20 ARC do not constitute an exhaustive list of all possible violations. Therefore, additional forms of abuses beyond these examples are possible. For instance, the Munich Court of Appeals found in a decision of 15 January 2015 that a sports federation abused its market power by conditioning an athlete's admission to the federation's competitions on the athlete's consent to submit all potential disputes to arbitration and to forfeit its right to address public courts. This decision might have considerable impact on the current system of sports arbitration involving the Court of Arbitration for Sport (CAS) in Lausanne.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The FCO is responsible for the enforcement of the dominance rules. It carries out investigations and decides whether a specific practice must be prohibited and whether a fine is appropriate. Prohibition and fining decision may be taken simultaneously or successively. Before adopting a formal decision, the FCO will normally issue a statement to which the enterprise concerned may respond. The FCO commences investigations either on its own initiative or, in the majority of cases, in reaction to complaints of third parties (ie, in particular competitors, customers or suppliers). As part of its proceedings, the FCO may carry out informal discussions or send informal questionnaires. Alternatively, the FCO may also take formal measures such as information requests or, subject to a prior court order, surprise inspections (dawn raids). Although there is no regulatory framework for settlements, according to the FCO, its power to conclude settlements derives from its discretion to pursue cases.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Fines: The FCO may impose fines on persons or entities that participated in an infringement of antitrust law or violated an FCO decision. In contrast to EU law, the FCO needs to identify one or more individuals who have committed the infringement and then attribute their behaviour to the legal entity they represented to impose a fine on that entity. Since the FCO may not refer to the concept of a 'single economic

entity', it is therefore difficult for the FCO to fine a parent company for infringements committed by employees of its subsidiaries.

The FCO may impose a maximum fine of up to €1 million on an individual and 10 per cent of the consolidated group turnover on a legal entity (section 81(4) ARC). According to the FCO's 2013 fining guidelines – which differ significantly from the European Commission's fining guidelines – the 10 per cent maximum does not constitute a cap limiting a fine calculated independently, but rather provides for an upper limit of the fining scale, which should be applied only in cases of the most extreme hard-core infringements. In order to calculate a fine according to these guidelines, the FCO first determines a basic amount, which equals 10 per cent of the turnover that the entity generated with the products or services related to the infringement throughout its duration. In a second step, this amount is multiplied by a factor between two and six depending on the size of the entity (or even higher in cases where the entity's turnover exceeds €100 billion). In a third step, the resulting basic amount may then be adjusted according to mitigating or aggravating circumstances. In addition, German administrative offence law allows the FCO to skim off any profits that the entity derived through its infringement (in which case the total fine may exceed the 10 per cent maximum).

Remedies: According to sections 32 to 34 ARC, the FCO may impose all remedies that are necessary to bring an infringement effectively to an end and that are proportionate to the infringement. This includes in particular the right to impose behavioural remedies (ie, measures that require action by the infringer). According to section 32a ARC, the FCO may also impose interim measures in cases of urgency if there is a risk of serious and irreparable damage to competition (the duration of interim measures should, however, not exceed one year). In addition, section 32(2) ARC provides for the – as of now theoretical – possibility of structural remedies. These include in particular the ability to order the divestiture (unbundling) of companies. Such structural remedies would, however, be subject to a strict proportionality test and can only be applied where behavioural remedies would be insufficient to remedy an infringement. To date, the FCO has not imposed any structural remedies in abuse cases.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The FCO can impose sanctions directly without prior petitioning of a court or other authority.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Throughout the past decade, the FCO has investigated potential abusive practices by dominant enterprises on several occasions. However, only in a few cases has the FCO actually adopted a formal decision based on either sections 18 et seq ARC or article 102 TFEU, with fines imposed in even fewer cases (a 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). Instead, the FCO has often dropped its investigations after the companies concerned have agreed to discontinue their allegedly abusive behaviour on a voluntary basis. In the same vein, the FCO has often ended proceedings by adopting commitment decisions (ie, by declaring offered commitments as binding).

The FCO's past enforcement activity has focused in particular on the energy, retail, postal service, water, harbour service and air transport sectors. It also carried out several sectoral investigations in industries with arguably oligopolistic structures in which it suspected structural problems, including the energy, fuel and food retail sectors. Since May 2011, the FCO has published seven reports on investigations into different sectors of which five specifically deal with (possible) abuses of market power (district heating, milk, fuel retail, wholesale fuel and food retail). In addition, the FCO is currently conducting two further investigations regarding ready-mixed concrete and meter-reading services.

Update and trends

The FCO can be expected to further expand its activities with respect to the internet economy and in the e-commerce sector. FCO President Andreas Mundt has stated that the FCO intends to continue taking a leading role as a pioneer in this area among other competition authorities. With respect to possible dominance issues, he recently 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.

The German Monopolies Commission (an independent expert committee, which advises the German government and legislature in the areas of competition policy-making, competition law, and regulation – without enforcement power) recently repeated that it sees competitive deficits in the fields of railway transportation, postal services and in the energy sector. Despite the Monopoly Commission's lack of enforcement or legislative powers, the FCO and the German legislator typically pay strong attention to its views.

Since 2015, the FCO has also focused more on the digital economy and online platforms – notably in light of the recent rise in 'online cases', including a decision concerning an alleged abuse of dominance by Google (see the FCO's decision in *Google/VG Media*, 8 September 2015).

In 2015, the FCO also found that Deutsche Post AG abused a dominant position in the provision of postal services by agreeing on letter prices and loyalty discounts with some of its largest customers that were impossible for other postal service suppliers to compete against (FCO decision in *Deutsche Post AG*, 2 July 2015). The FCO found that Deutsche Post AG's behaviour was abusive in two ways: It fulfilled the requirements of a margin squeeze (see question 18) and also constituted an illegal use of loyalty rebates (see question 14).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

According to section 134 of the German Civil Code, legal transactions violating statutory prohibitions, such as sections 19 and 20 ARC, are void. However, it must be determined on a case-by-case basis, in line with (German) civil law, whether the fact that certain legal clauses within a comprehensive agreement violate sections 18 or 19 ARC results in the nullity of the entire agreement, or whether the nullity is restricted to the problematic contractual clauses. In many cases, it is regarded reasonable to limit the nullity to single contractual clauses in order to protect the disadvantaged party, for example if a contract, while providing for an overcharged price, is important for the other contractual party.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The legal basis for private enforcement is section 33(1) ARC, which provides the affected party with claims for compensation and rectification of the infringement as well as, where there is a risk of recurrence, for an injunction. The legal consequences of these claims strongly depend on the individual case at hand. In certain cases it may even be in the discretion of the dominant company how to rectify the infringement, eg, whether to offer the same rebate to the discriminated company or to subsequently deny preferential treatment to the favoured company. In general, granting access to infrastructure, supplying goods or services or concluding a contract are all possible legal consequences of private enforcement under section 33 ARC. Accordingly, in one instance the owner of an airport was ordered to grant a company providing shuttle

services access to the roadway leading to the terminal (judgment of the Koblenz Court of Appeals, 17 December 2009).

Following a significant increase in cartel-related follow-on damage litigation over recent years, damage actions or other types of litigation (eg, requesting the termination of discriminatory conduct, access to a network or infrastructure) based on alleged restrictive unilateral conduct have also become fairly commonplace. 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.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Section 33(3) ARC provides an express legal basis for damage claims based on deliberate or negligent infringements of antitrust law, which are adjudicated by the ordinary courts of law (civil courts). In the context of follow-on suits, German courts are legally bound by the final decisions of the FCO, Commission, or any other EU member state's antitrust authority with respect to the determination of the antitrust infringement, ie, other factors, such as causality and amount of damages, are not covered by the binding effect. The amount of damages that may be granted is strictly limited to the material losses of the company harmed by the abusive practices. There is no legal basis for punitive damages.

German law currently does not provide for class actions seeking damages. Instead, victims of illegal unilateral conduct that want to consolidate their individual damage claims may assign their claims to one party or institution, which then brings the law suit.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

FCO decisions 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 of Justice. 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.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Section 20 ARC: As noted above, going beyond the scope of article 102 TFEU, the ARC prohibits exclusionary (and discriminatory) conduct not only by undetakings that are dominant in 'absolute' terms, but also by undertakings on which 'small or medium-sized companies depend' as suppliers or purchasers of certain goods or commercial services (section 20(1) ARC), and by companies enjoying 'stronger market power in comparison with their small and medium-sized competitors' (section 20(3) ARC). The prohibitions laid down in section 20 ARC aim at protecting small and medium-sized companies against anticompetitive conduct by their larger trading partners or competitors.

This prohibition of discrimination or unreasonable obstruction for 'relatively' dominant enterprises towards dependent companies was introduced primarily to address buyer power in the (food) retail sector. Thus, section 20(1) sentence 2 ARC sets forth a legal presumption of dependency if a supplier of goods frequently grants additional rebates or similar bonuses to a customer that are not also granted to other customers. 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 conduct is frequent below-cost pricing, section 20(3) ARC. 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.

Section 21 ARC: In addition to the rules laid out in sections 18 through 20 which apply only to enterprises with dominant market positions or enterprises that are dominant at least in relative terms by enjoying relative market power with respect to small or medium-sized undertakings, section 21 ARC stipulates a number of prohibited forms of unilateral behaviour by individual enterprises or groups of enterprises that do not require any from dominance.

Under section 21(1) ARC, an enterprise (or association of enterprises) may not request that other enterprises boycott a third enterprise (ie, to refuse either to supply this enterprise or to purchase from it). However, this prohibition only applies if the enterprise requesting the boycott act with the intention to unfairly impede the third enterprise.

Under section 21(2) ARC, an enterprise (or association of enterprises) may not induce other enterprises, by either coercion or incentives, to engage in conduct that is prohibited under German or EU antitrust law. This (secondary) prohibition is intended to prevent enterprises from forcing other enterprises to engage into horizontal cartels, or illegal vertical agreements (for instance, it might apply to a supplier that tries to coerce retailers to apply a specific resale pricing policy; where the retailer agrees, this infringes section 1 ARC; where the retailer does not agree, the supplier's conduct infringes section 21 ARC).

Section 21(3) ARC prohibits the use of coercive measures in order to induce another enterprise to engage in activities that might influence competition, but do not, in principle, infringe antitrust law (eg, to force an enterprise to merge with another enterprise).

Section 21(4) ARC prohibits enterprises from causing economic harm to a third person in retaliation for this person requesting the FCO to take action.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The general provision prohibiting abuse of dominance is article 2 of Law 3959/2011. This is the new competition law that was adopted in Greece in April 2011 and replaced the long-standing Law 703/1977. Although several structural changes have been introduced, the main prohibitions (of anticompetitive agreements and abuse of dominance) remain the same. The wording of the above provision, actually constituting a literal translation of the equivalent article 102 TFEU (ex article 82 EC Treaty), was initially introduced before Greece joined the EU and has remained unchanged until now, although the previous L703/1977 had been radically amended several times.

Of course, article 102 TFEU itself is also directly applicable in Greece in cases that might affect trade between member states.

Besides the above provisions, there are also sector-specific provisions (mainly for telecoms, postal services and energy) that cover undertakings holding 'significant market power' and specify, among other things, the obligation for 'access to essential facilities'.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Greek law does not contain a definition of dominance. The notion of dominance is well established in practice and its elements have been formulated in European case law, which is followed by the Hellenic Competition Commission (HCC). In this respect, the criteria of market share (possibly less than 40 to 50 per cent, depending on the allocation of market power among the other players) and the ability of a firm to act independently of competitors and customers are applicable. The latter is also used for the identification of 'significant market power' (a notion similar to dominance) in regulated industries (eg, telecoms).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of Greek competition law is mainly economic. Although no explicit distinction is made, it aims to ensure the proper functioning of the market and, in effect, leads to consumer welfare. The well-established criteria for the exemption of anticompetitive agreements (albeit not technically addressing abuse of dominance), as set out in article 1 paragraph 3 of L3959/2011 (equivalent to article 101 paragraph 3 TFEU), confirm the above.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Following the EU-wide liberalisation of key industry sectors, which were traditionally under state control (telecoms, postal services and energy), there are special provisions on regulatory and technical issues, including network access, cost-orientation and non-discrimination. This framework mainly has a regulatory (ex ante) approach and is not contradictory, but rather is complementary to the general abuse of dominance provisions.

It is also worth mentioning the provisions of article 11 of L3959/2011, which, under certain circumstances (mainly lack of workable competition) give the HCC additional powers to examine any sector of the Greek market and impose structural measures for the creation of effective competition conditions (in practice, up until now, it has been rarely applied: pursuant to the previous equivalent article 5 of L703/77, in the case of Oil Companies in 2008 and pursuant to article 11 of L3959/11, in the market of production, marketing, distribution and retail of fresh fruit and vegetables in 2013 and lately there is an ongoing investigation in the retail sector).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Dominance provisions apply to all undertakings, (ie, to both private and public entities) as long as there is a business activity (functional criterion). It must also be noted that, in HCC practice, there have been several cases in the past that have involved liberal professions (dentists, lawyers and engineers).

In its Decision 501/V/2010, the HCC examined an alleged abusive practice by the municipality of Athens regarding the terms of concession of use of the pavement for cafes, restaurants, etc. It was held that this is not an economic activity and therefore the municipality of Athens was not considered to be an undertaking in this respect. Several other publicly owned companies, such as DEPA, DESFA (natural gas) and OLP (port authority), have been treated as undertakings.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Greek law does not control the growth of an undertaking's position in the market through its own lawful conduct. This is only filtered through merger control provisions. Article 7 of Law 3959/2011, as amended and at present in force, establishes the substantive test for mergers, which is similar to the SIEC test of EC Regulation 139/2004. It must be noted, however, that, in the case of mergers in the media sector, the dominance test applies (article 3 paragraph 7, L3592/2007).

7 Collective dominance

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

Greek law does not contain an explicit provision covering collective dominance. It is, however, indirectly identified in article 2 of L3959/2011, which prohibits any abuse of dominance by one or more undertakings, etc.

Collective dominance is a concept stemming from the EU approach and case law. It is generally accepted that it presupposes two conditions:

- that there is no substantial competition between the oligopolistic undertakings involved; and
- that there are no significant competitive constraints exercised towards this 'single entity' by other competitors in this market.

The HCC has applied the issue of collective dominance a few times in Greek practice. One of these cases (Decision 20/1996) had to do with the allegedly uniform behaviour of several financial institutions, regarding the charges for underwriting services in the case of an IPO. A more recent case before the HCC (452/V/2009) concerned the fining of English-language book wholesalers, which was upheld by the Administrative Court of Appeal. The alleged abuse of the two local distributors constituted in the imposition of uniform and unfair commercial terms of cooperation with their customers. During 2010 (Decision 482/VI/2010), the HCC rejected a complaint filed by a local cinema against four major film distributors for alleged abuse of collective dominance, considering that the conditions required, as per European case law, were not met. In an ongoing case (cosmetics), it seems that the HCC inclines towards the existence of collective dominance, but not an abuse of it.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

There is no special legislation regarding dominant purchasers. Although this may not generally be expected to be the case, such practices exercised by purchasers, if abusive, would fall under the general scope of article 2 of L3959/2011. It must be noted that the cases of imposing unfair commercial terms and discrimination explicitly refer both to practices coming from 'sellers' and 'purchasers'. The details of the examined behaviour would indicate the exact form of violation accordingly, as the case might be.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

In accordance with the EU approach, the first step is to define the relevant product and geographical market and the next is to estimate the market power of the interested parties therein. A relevant product market comprises all those products or services that are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. A relevant geographical market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous. In most cases brought before the HCC, the relevant geographical market normally involves the whole Greek territory and this, usually being considered as 'normally capable of affecting trade between member states', also entails the application of articles 101 and 102 TFEU.

There are no exact market-share thresholds for dominance provided by law. Here again, Greek practice follows the general EU approach, which generally accepts as dominant an undertaking whose market share exceeds 40 to 50 per cent. Of course, the overall market structure is always of interest (market dispersion, legal or actual barriers to entry, etc), so that even undertakings with less market share (even around 30 per cent) could be held to be dominant under certain circumstances.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article 2 of L3959/2011 provides for an indicative list of typical forms of abuse of dominance. It reads as follows:

> *Any abuse by one or more undertakings of a dominant position, within the national market or in a part of it, is prohibited. Such abuse may, in particular, consist in:*
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

The variety of abusive practices that a dominant enterprise may follow is evident in the case law so far. Among others, the extremely grey area of discounts by dominant undertakings is very hard to apply in Greece.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Both aspects of possible abusive practices are covered, since Greek law does not distinguish between horizontal (exclusionary) and vertical (exploitative) practices. This is confirmed by the indicative examples included in article 2 of L3959/2011, which fall under both categories accordingly.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

A causal link between dominance and abuse is required in order to assess a violation of article 2 of L3959/2011. However, this does not mean that practices conducted by a dominant undertaking in another, adjacent market (where it is not dominant) fall out of the scope of application of the above provision.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

A critical element for defending an alleged abuse of dominance is its objective justification, interrelated with a commercial rationale. Also, potentially overriding interests (more efficient service for the customer) may counterbalance a prima facie abusive behaviour. Proportionality is crucial in any case for the overall assessment of certain conduct.

It must be noted that, especially in cases of alleged discrimination, the prohibition of dissimilar treatment in similar situations is often misinterpreted as an 'absolute' equality of treatment. However, the 'details' of a specific practice cannot and must not be disregarded, since, for example, the different credit risk or sales volume between customers may well justify their different treatment. A comprehensive understanding of the facts of each case, combining vigorous legal analysis and economic competitive assessment, is a prerequisite for grey areas, which is mostly the rule in competition law.

Specific forms of abuse

14 Rebate schemes

As already mentioned, with the evolution of EU case law, it is a rather hard task in practice for a dominant firm to implement a feasible

discount policy that could stand effectively in the reality of the marketplace and, at the same time, be in full compliance with competition rules. It is generally accepted that rebates connected with, inter alia, target sales are only exceptionally admissible once they are cost-related. The rationale is in line with the EU approach (ie, to prevent dominant firms from any practices that set out to bind the customers and exclude them from potential competitors).

In its decision 459/V/2009, the HCC fined Nestlé €29 million for alleged abuse of dominance in the instant coffee market (both retail and HORECA), grounded, among others, on target discounts and fidelity rebates. Fidelity rebates were also allegedly assessed in HCC Decision No. 517/VI/2011, which examined a 20-year-old case in the pumice stone market. The recent decision against Tasty Foods in the snacks market contains significant points related to rebate schemes and generally the acceptable limits of discount policy in the case of dominant players.

The same goes with the latest decision of the HCC against Athenian Brewery SA (Decision 590/2014). According to the decision, the dominant player, Athenian Brewery SA, adopted and implemented a single, multi-faceted, long-standing and targeted policy that sought to exclude its competitors from Horeca chains and small retail outlets and to limit their growth possibilities.

15 Tying and bundling

Tying and bundling may enable dominant firms to leverage their power in a neighbouring market. As already mentioned, article 2 of L3959/2011 explicitly prohibits dominant undertakings from making the conclusion of contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In the practice of the HCC, bundling contract arrangements were allegedly identified in the *Nestlé* case.

16 Exclusive dealing

Although exclusivity is not considered to be per se illegal (actually it is in principle exempted in cases of certain vertical agreements, falling under EC Regulation 330/2010), it is still treated with scepticism in cases of dominance. The reason is that such clauses, when imposed by dominant undertakings, could lead to exclusionary effects. The first important case of this kind brought before the HCC (decision 309/V/2006) regarded the alleged practices of the Coca-Cola Hellenic Bottling Company (freezer exclusivity). The *Nestlé* case also dealt with exclusivity provisions, both direct and indirect (English clause), which were found to be abusive. The same applies to the most recent *Tasty and Beer* case, where it appears that there have allegedly been entry and expansion barriers to the exclusion of competitors.

17 Predatory pricing

The proper assessment of such conduct presupposes a careful cost analysis. As a general rule, the critical threshold is average variable cost, since sales below such a cost are deemed to be abusive. Other than that, each case needs to be examined on an ad hoc basis, in the framework of the exact competition conditions of each market. As far as we can tell, the HCC has not yet dealt with such a case.

18 Price or margin squeezes

Price squeeze applies mainly if a dominant firm is vertically integrated and therefore has the dual capacity of a supplier (in the upstream market) and a competitor (in the downstream market). In extreme cases, the retail price of the dominant firm in the downstream market may be even lower than the wholesale price charged by the same firm to its competitors in the upstream market. Such complaints often concerned recently liberalised sectors (eg, telecoms), where the incumbent operator allegedly attempted to suppress alternative telecoms operators, either through bundling or through a price squeeze.

19 Refusals to deal and denied access to essential facilities

The general rule of economic freedom, entailing the right of any party to enter or not enter into an agreement with another party, is to some extent restricted, under certain conditions, in the case of dominant firms. Unless objectively justified, a dominant firm bears the special responsibility not to take advantage of its market power at the expense of its customer's or supplier's dependence. A classic case of objective justification of refusal to deal would be the effective protection of the dominant firm's economic interest towards a non-credible counterparty.

Granting access to essential facilities is a special reflection of the above general obligation and is mainly met in particular markets where a network infrastructure is required (telecoms, etc).

20 Predatory product design or a failure to disclose new technology

Such conduct has not yet applied in Greek practice.

21 Price discrimination

Dominant firms bear a special responsibility to refrain from discrimination against their customers, provided there are similar situations with which to compare. A rather important case on this subject (Decision 428/V/2009, on container terminals) regarded the alleged differential treatment by the Piraeus Port Authority (PPA) in favour of MSC (through a cooperation agreement for transshipment cargo) and against the customers of local cargo. Interestingly enough, the HCC, although it rejected the allegation of alleged abuse of dominance, still fined the two companies (PPA and MSC) for alleged anticompetitive behaviour contrary to articles 1 of L703/77 and (the equivalent) 101 TFEU. The parties challenged this decision successfully before the Athens Administrative Court of Appeal and the Conseil D' Etat, which accepted that the alleged differentiation, referring to dissimilar situations, is well justified and annulled the decision of the HCC.

Another case referred to the gas supply companies of Thessaloniki and Thessaly (decision No. 516/VI/2011). The HCC held that the accused companies abused their dominant position on the relevant market pertaining to the authorisation of natural gas installations, by way of discrimination, as they did not accept the use of certain types of pipes for indoor gas installations (without due justification).

22 Exploitative prices or terms of supply

Dominant firms are prohibited from taking advantage of their market power and imposing unfair business terms of cooperation on their customers or suppliers. In the *Container Terminals* case (428/V/2009), the HCC dealt with the alleged excessive pricing by PPA against the customers of local cargo. The allegation was rather oversimplified in the complaint, being merely based on the comparison between the price charged and the average total cost of the services offered in the container terminal, without properly distinguishing the two distinct product and geographical markets to which these services are addressed.

23 Abuse of administrative or government process

Such conduct has not yet applied in Greek practice.

24 Mergers and acquisitions as exclusionary practices

No such cases have applied in practice. Merger control provisions ensure protection from any concentration that could significantly impede effective competition.

25 Other abuses

Generally, the cases included in article 2 of L3959/2011 are not exhaustive, therefore new practices can be added to the already long list of abusive conduct.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

According to article 12 of L3959/2011, the main administrative authority in charge of enforcing competition law in Greece (both national and European provisions) is the HCC, which consists of eight members, of whom six are full-time appointees (a chairman, a vice chairman and four commissioners). Given that under the previous regime of L703/1977, the HCC consisted of nine members (one chairman, four commissioners and four part-time members), there are transitional provisions for passing to the new structure.

Investigations can be initiated either ex officio (eg, in cases of public interest, if a certain anticompetitive pattern has come to the attention of the authority) or upon a complaint submitted by a third party (usually a competitor, supplier or customer).

The investigative powers of the General Directorate of Competition (part of the HCC) are specifically provided for in L3959/2011 and are generally in line with the typically similar powers of the European competition authorities. Investigation requires a written mandate from the chairman of the HCC, which defines the scope and legal basis of the investigation and also mentions the sanctions applicable if the enterprise fails to comply and cooperate. As the case may be, other public officers or authorities can also be involved in the investigation carried out by the officers of the General Directorate of Competition, which also have to comply with constitutional restraints (eg, in the case of investigation in the residence of the representatives of an enterprise, court authorisation is required).

The failure of an enterprise to comply with the investigation (eg, refusal to provide information or submission of misleading data or concealment of documents) entails administrative and criminal sanctions.

As soon as the investigation is concluded, the General Directorate of Competition assesses the findings of the investigation and proceeds, in cooperation with one of the commissioners, with the drafting of a recommendation (similar to a statement of objections) to the HCC. Such a recommendation is notified to the parties involved, in order to express their position both orally and in writing before the HCC (right of prior hearing). The latter is to ultimately decide on the case. It is worth noting that, as per the new law, the Commissioner in charge of the case does not have a right to vote, for reasons of objectivity.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

According to article 25 of L3959/2011, the HCC has the power to:

- oblige the undertakings to cease the violation and refrain from repeating it in the future;
- accept commitments offered by the undertaking and render such commitments mandatory;
- impose behavioural or structural remedies, on a proportional basis;
- address recommendations and threaten the undertakings with fines or penalties in the case that the violation is repeated;
- forfeit the fine or penalty, in the case it is certified by the HCC's decision that the violation has not ceased or has been repeated; and
- impose fines on the violating undertakings.

The fine cannot exceed 10 per cent of the aggregate turnover of the undertaking for the previous fiscal year, depending on the gravity and the duration of the infringement. EC guidelines for the calculation of the fine are also followed by the HCC. Up until now, one of the highest fines in dominance cases has been imposed against Nestlé (approximately €29 million) and most recently against Tasty (approximately €16 million).

As per the provisions of L3959/2011, there are three new elements on administrative sanctions:

- for groups of companies, the aggregate group turnover is to be considered;
- if the economic benefit enjoyed by the undertaking can be measured, then the fine cannot be less than that (even if it exceeds the threshold of 10 per cent); and
- individuals involved in violation of L3959/2011 face a two-fold personal liability. On the one hand, they are jointly liable together with the undertaking for the payment of the above fine (this also existed under L703/77). On the other hand, a separate fine ranging from €200,000 to €2 million may be imposed against them if they have been involved in preparing, organising or committing the violation, whatever it is.

Criminal sanctions are also threatened in the case of violation of article 2 of L3959/2011 or 102 TFEU. Fines in this case have doubled with the new law and now range from €30,000 to €300,000 (article 44, paragraph 2 of L3959/2011).

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Yes, they can impose sanctions directly, as above.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In 2014, the HCC dealt with a dominance case for alleged infringements by Athenian Brewery SA in the Greek beer market (following ex officio investigation and following a complaint by Mythos Brewery SA) and issued Decision No. 590/2014, which is analysed above. Athenian Brewery has appealed before the Athens Court of Appeal, where the hearing process is completed and the decision is now expected.

Moreover, the HCC is examining a dominance case for alleged refusal to supply and deal, against PPC SA.

The HCC has convened to examine whether to order interim measures against Public Power Corporation SA Greece (PPC SA) in the context of a pending investigation in the markets for the production and trade of electricity, which was initiated following a complaint by Aluminium of Greece SA and its parent group Mytilineos Holdings.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

If there is an infringement, the contracts entered into by dominant undertakings are null and void.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is possible according to the general provisions. The EU Directive 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 has been already adopted at EU level. Implementation in Greece is still pending.

There have been some rare court cases, regarding refusal to deal and access to essential facilities in the telecoms sector, that have combined abuse of dominance with the general provisions for abuse of rights (Civil Code 281).

Other than that, there are some competition cases that have been brought before civil courts, but judges mostly lack expertise and this creates significant hurdles to effective judicial protection.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

It is possible to seek compensation before civil courts for any damage suffered owing to the prohibited abusive conduct. Such a claim is grounded in article 914 of the Civil Code (on tort). The damages could cover any proven losses suffered thereof (ie, both direct losses and loss of profits, but not punitive damages).

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Decisions issued by the HCC are, at the first stage, subject to appeal before the competent Administrative Court of Appeal and are subsequently subject to petition for annulment before the Council of State.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

L3373/2005 had reinstated article 2a of L703/77, which prohibits any abuse in relation to the 'economic dependence' of an enterprise that has the position of a customer or a supplier of products or services and does not have an equal alternative solution. In accordance with this provision, the abuse of economic dependence may consist especially in the imposition of arbitrary transaction terms or the sudden and unjustified termination of long-term commercial relations.

This provision was initially introduced in 1991 and then abolished in 2000. Although in principle acceptable, from the perspective of European law (article 3 paragraph 2 of EC Regulation 1/2003), this provision was heavily criticised as incompatible with the objectives of the legislation surrounding free competition law, since it mainly referred to civil disputes between individuals.

The amendment of Law 703/77 that took place in 2009 (L3784/2009) removed article 2a and introduced it as part of the law for 'unfair competition' (new article 18a of L146/14). In practice this means that the application and enforcement of this provision now may be only brought before the civil courts and no longer before the Hellenic Competition Commission (the HCC).

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The principal legislation covering unilateral conduct of firms with market power is set out in Part 2, Division 2 of the Competition Ordinance (Cap 619) (CO).

Specifically, section 21(1) CO prohibits an undertaking that has a substantial degree of market power (SDMP) from abusing that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. This prohibition is referred to as the Second Conduct Rule (SCR) and applies to conduct taking place after 14 December 2015, when the substantive provisions of the CO came into force.

In July 2015, the Hong Kong Competition Commission (CC) and the Communications Authority (CA) jointly issued the Guideline on the SCR (SCR Guideline). The SCR Guideline does not have binding legal effect, but sets out how the CC and CA intend to interpret and give effect to the SCR.

The CO also introduced a new section 7Q to the Telecommunications Ordinance (Cap 106) (TO), which prohibits a licensee in a dominant position in a telecommunications market from engaging in conduct that is, in the opinion of the CA, exploitative (such as excessive pricing or setting unfair trading terms).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The SCR applies to abuses of a substantial degree of market power. The SCR Guideline sets out the CC and CA's interpretation of SDMP which, according to paragraph 3.2, arises 'where an undertaking does not face sufficiently effective competitive constraints in the relevant market' and can be thought of as 'the ability profitably to charge prices above competitive levels, or to restrict output or quality below competitive levels, for a sustained period of time'. The authorities would normally consider a sustained period to be two years, although the relevant period may be shorter or longer depending on the facts, in particular with regard to the product and the circumstances of the market in question.

The CC and the CA have indicated that this definition does not preclude the possibility of more than one undertaking having SDMP in a relevant market, particularly if the market is highly concentrated with only a few large market participants (paragraph 3.3 of the SCR Guideline). SDMP appears on the face of it to connote a lower threshold than dominance. However, it will ultimately be for the Competition Tribunal to interpret the CO definition.

Section 7Q of the TO applies to exploitative conduct of a licensee in a dominant position in a telecommunications market. A licensee is considered to be in a dominant position if, in the opinion of the CA, it is able to act without significant competitive restraint from its competitors and customers (section 7Q(2) of the TO). Section 7Q(3) TO sets out the factors that, in considering whether a licensee is dominant, the CA must take into account.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The SCR has a clear economic focus. The CC and CA have stressed that the SCR applies only to undertakings carrying out economic activity which engage in conduct that has an anticompetitive object or effect.

The economic focus is also reflected in the CC's Enforcement Policy, which indicates that the CC intends to direct its resources to matters that provide the greatest overall benefit to competition and consumers in Hong Kong.

In the telecommunications sector, the additional prohibition under section 7Q of the TO seeks to prevent a dominant firm from engaging in exploitative conduct and therefore has a greater focus on protection of consumers rather than competition.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The SCR prohibits any abuse of SDMP occurring on or after 14 December 2015, irrespective of the economic sector in which the conduct in question takes place. With the exception of section 7Q of the TO, there are no sector-specific rules which apply to conduct of this type after 14 December 2015.

Prior to implementation of the CO, firms operating in Hong Kong's broadcasting and telecommunications sectors were subject to sector-specific legislation, namely:

- sections 7L and 7N of the TO, which prohibited a licensee in a dominant position in a telecommunications market from abusing its position (7L) and engaging in certain discriminatory practices (7N); and
- section 14 of the Broadcasting Ordinance (Cap 562) (BO), which prohibited a licensee in a dominant position in a television programme service market from abusing its position.

These sector-specific provisions were repealed by the CO. The conduct of telecommunications and broadcasting licensees with market power after 14 December 2015 is now subject only to the SCR. However, pursuant to sections 3 and 4 of Schedule 9 of the CO, alleged abuses of dominance that took place (in whole or in part) prior to 14 December 2015, and which would otherwise have been regulated by the sections 7L of the TO or section 14 of the BO, may be investigated by the CA under the provisions of the BO or TO as if those sections had not been repealed.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Subject to a number of specific exclusions set out in the CO and secondary legislation, the SCR potentially applies to the conduct of any entity engaged in economic activity (regardless of its legal status or the way in which it is funded).

The key exclusions are as follows.

The SCR does not apply to statutory bodies constituted by or under an Ordinance, except those specified by a regulation of the Chief Executive in Council. (At the time of writing, six specific statutory bodies are specified as being subject to the SCR by virtue of the Competition (Application of Provisions) Regulations (Cap 619A).)

The Competition (Disapplication of Provisions) Regulation (Cap 619B) also excludes from the application of the SCR seven specific entities related to Hong Kong Exchanges and Clearing Limited.

Finally, section 6 of Schedule 1 of the CO excludes conduct of an undertaking that has a global turnover not exceeding HK$40 million for the previous financial year.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

As noted in the answer to question 1, the SCR prohibits an undertaking that has SDMP from abusing such market power. Likewise, section 7Q of the TO applies to exploitative conduct of a licensee in a dominant position in a telecommunications market. It follows that neither the SCR nor section 7Q of the TO prohibits conduct unless the firm in question has the requisite degree of market power at the time the conduct in question takes place.

The SCR Guideline stresses that the legislation is not concerned with preventing firms from gaining market power, as it is recognised that the pursuit of market power through innovation and competition is key to a prosperous free market economy (paragraph 1.9 of the SCR Guideline).

7 Collective dominance

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

There is no separate concept of collective dominance in the CO. However, according to the SCR Guideline, the wording of the SCR does not preclude the possibility of more than one undertaking having SDMP in a relevant market.

No additional guidance has been provided and no cases have come before the Competition Tribunal to clarify the circumstances in which joint or collective market power may arise. Nor have the authorities opined on the extent to which the joint conduct of two or more undertakings could amount to a breach of the SCR. Therefore, while the wording of the CO does not appear to envisage a collective market power doctrine, in the light of the SCR Guideline, the possibility that such a doctrine could emerge cannot be excluded.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The SCR is not limited to the conduct of suppliers with SDMP and the SCR Guideline expressly acknowledges that market power might equally arise where a buyer has the ability to obtain purchase prices below the competitive level for a sustained period of time.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Market definition

The SCR Guideline sets out the analytical framework the CC and CA intend to use in defining the relevant product and geographic markets for the purposes of conducting a competition assessment under the CO. In common with many other global competition law enforcers, the CC and CA have stressed that the exercise of defining the relevant market is no more than an analytical tool, designed to assist them in identifying, in a systematic way, the competitive constraints faced by an undertaking and is not an end in itself.

The CC and CA will adopt a familiar, and largely uncontroversial, methodology. According to paragraph 2.6 of the SCR Guideline, the relevant market within which to analyse market power has both a product dimension and a geographic dimension. In this context, the relevant product market comprises all those products that are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use; and the relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question.

In determining the relevant product market, substitutability from the perspective of the buyer is key (see paragraph 2.10 of the SCR Guideline). For this purpose, the CC and CA would generally apply the 'hypothetical monopolist test'. This entails the authorities considering whether a hypothetical firm with a monopoly in a narrowly defined category of goods or services would be able profitably to impose an small but significant non-transitory increase in price (SSNIP) (typically between 5 per cent and 10 per cent). If sufficient buyers would switch to substitute products in response to a SSNIP to render it unprofitable, the candidate market may be expanded to include the substitute products to which buyers would switch. The same analysis will be performed on the expanded candidate market until a group of products over which a hypothetical monopolist can profitably impose a SSNIP is identified. The group of products forms the relevant product market.

The CC and CA have stated that they will not generally consider supply-side substitutability or potential competition when defining a market. Rather, the likelihood of supply-side substitution will be considered at a later stage in the analysis (typically when considering whether an undertaking may have market power).

Market share thresholds

Although a market share threshold of 25 per cent (below which it was suggested that SDMP was unlikely to arise) was proposed by the Commerce and Economic Development Bureau during the debates on the legislation, the CO did not ultimately adopt any market share thresholds or 'rules of thumb'.

The CC and CA have resisted giving an indication of any particular market share at which SDMP is likely to arise or at which the CC and/or CA would consider to be conclusive of an undertaking's market power. While the CC and CA recognise that an analysis of market shares may be useful as an initial screening device in the assessment of substantial market power and that undertakings are more likely to have market power where they have high market shares, the SCR Guideline stresses that high market shares do not necessarily imply SDMP and the determination should be made on the facts of the particular case, including the characteristics of the industry involved and the nature of competition in the relevant market. (See question 2 for further discussion of the SDMP test.)

It is worth noting generally that, given the prosecutorial nature of the CO regime, the tests to be applied in defining the extent of the relevant economic market and/or the level of market shares indicative of market power will ultimately be a matter for the Competition Tribunal. At the time of writing, no cases involving abuses of SDMP have been brought and there is no guidance on the approach the Tribunal is likely to adopt in CO cases.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The SCR applies to conduct carried out by an undertaking with SDMP that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. The legislation therefore follows both form-based and effects-based approaches in identifying abusive conduct.

The SCR Guideline provides that conduct may be considered to have the object of harming competition if it can be regarded, by its very nature, as being so harmful to the proper functioning of normal competition in the market that there is no need to examine its effects. In this context the object of conduct refers to the purpose or aim of the conduct, viewed in its context, and in light of the way it is implemented, and not merely the subjective intentions of the undertaking concerned. The SCR Guideline further sets out a number examples of conduct that the CC and CA regard as potentially having the object of harming competition, including predatory pricing (setting prices below average variable costs); certain exclusive dealing arrangements; and paying to delay the introduction of a competitor's products.

In cases where the conduct in question does not have the object of harming competition, it will be considered to be an infringement if it has an anticompetitive effect. According to the SCR Guideline, when demonstrating that conduct has an anticompetitive effect, the CC and/or CA may consider not only any actual effects, but also effects that are likely to flow from the conduct. The SCR Guideline also states that for conduct to have an actual or likely effect on competition, it must harm the process of competition (as opposed to harming individual competitors) and identifies tying and bundling, margin squeeze, refusals to deal and exclusive dealing as (non-exhaustive) examples of the types of conduct that may potentially constitute an abuse.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

In its Enforcement Policy dated November 2015, the CC indicated that it will accord particular priority to conduct involving exclusionary behaviour by incumbents operating in one or more markets in Hong Kong. As noted in the answer to question 10, the SCR Guideline states that for the CC and/or CA to regard conduct as having an actual or likely effect on competition, it must harm the process of competition. All of the examples of abuses provided in section 5 of the SCR Guideline are exclusionary in nature and exploitative abuses such as excessive pricing or price discrimination are not mentioned. This clearly indicates that the CC's focus will be on exclusionary conduct. Nevertheless, the SCR does not draw any distinction between exploitative and exclusionary practices and it is at least arguable that both types of practices could constitute an abuse.

Exploitative conduct by a licensee in a dominant position in a telecommunications market is specifically prohibited by section 7Q of the TO.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The SCR prohibits an undertaking that has SDMP in a given market from abusing its power in that market by engaging in conduct with an anticompetitive object or effect. This suggests there must be a nexus between the market in which the undertaking in question has power and the (ab)use of that power. However, the SCR does not expressly require that the impugned conduct must have effect in the same market in which the undertaking maintains market power: the abusive conduct need only have as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

The SCR Guideline makes it clear that, in the view of the CC and CA, it is possible for an undertaking with SDMP in one market to engage in conduct that has an impact in a different market. Paragraph 4.2 of the SCR Guideline gives as an example a situation in which an undertaking leverages its market power in a one market to harm competition in a second. Likewise, paragraphs 5.8-5.12 of the SCR Guideline envisages that tying and bundling (whereby an undertaking abuses SDMP in the tying market with a view to harming competition in the tied market) would amount to an abuse.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The CO does not contain any statutory defences. However, there are a number of exclusions and exemptions to the SCR, which are set out in Schedule 1 to the CO.

Broadly, the SCR does not apply to conduct:

- to the extent it is engaged in for the purpose of compliance with legal requirements;
- that would obstruct the performance of particular tasks assigned to an undertaking entrusted by the Hong Kong government with the operation of services of general economic interest;
- that would result in a merger within the meaning given by sections 3 and 5 of Schedule 7 of the CO; and
- of an undertaking that has a turnover (whether in or out of Hong Kong) not exceeding HK$40 million in the financial year preceding the calendar year in which the conduct in question was engaged in.

There is no efficiency-based exclusion available for conduct within the scope of the SCR. However, the SCR Guideline envisages that it would be open to an undertaking to argue that the conduct in question is not abusive because either:

- it was indispensable and proportionate to the pursuit of some legitimate objective unconnected with the tendency of the conduct to harm competition; or
- the conduct entails efficiencies sufficient to guarantee no net harm to customers.

Neither the CO nor the SCR Guideline precludes the application of these exclusions to conduct which is abusive by 'object'.

In addition to the defences outlined above, an undertaking may be able to defend a prosecution of an abuse by effect on the basis that no anticompetitive effect is likely to arise. However, such an argument would not be available in a case where the abuse in question was found to have had the object of preventing, restricting or distorting competition in Hong Kong.

Specific forms of abuse

14 Rebate schemes

The SCR Guideline recognises that rebates conditioned upon purchasing obligations which are granted by undertakings with SDMP can have anticompetitive foreclosure effects similar in nature to exclusive dealing arrangements. In some cases, the CC and CA may regard exclusive dealing arrangements (a term which is defined as including rebate schemes) as having an anticompetitive object.

The SCR Guideline draws a distinction between rebates granted on all purchases from the undertaking (retroactive rebates) and those granted upon purchases above a certain threshold (incremental rebates). The CC and CA's view is that retroactive rebates have the potential to foreclose the market significantly, whereas generalised quantity rebates are less likely to raise competition concerns unless they are predatory in nature.

15 Tying and bundling

According to the SCR Guideline, tying occurs when a supplier makes the sale of one product conditional upon the purchase of another, whereas bundling refers to a situation in which a package of two or more products is offered at a discount. The SCR Guideline recognises that tying and bundling are common commercial arrangements which do not harm competition in the absence of SDMP, but that such conduct can contravene the SCR where an undertaking leverages its SDMP in a market for one product to foreclose competition in the market for another.

16 Exclusive dealing

According to the SCR Guideline, the term 'exclusive dealing' covers exclusive purchase and exclusive supply obligations as well as incentive arrangements having a similar effect. The SCR Guideline recognises that exclusive dealing is a common commercial arrangement, which generally does not harm competition. However, it may amount to an abuse where it is used by an undertaking with SDMP to foreclose competitors from a market by preventing those competitors from securing supplies of key inputs or from being able to supply certain customers.

According to the SCR Guideline:

- exclusive supply obligations are likely to be of concern where the obligation in question locks up most of the efficient input suppliers in the market and competitors are unable to secure the inputs from alternative suppliers; and
- exclusive purchasing or minimum stocking obligations are likely to be of particular concern where the undertaking with SDMP has imposed such obligations on many customers; it is likely that consumers as a whole will not derive a benefit; and the relevant obligations, as a whole, have the effect of preventing entry or expansion by competitors (because, for example, the exclusive purchasing obligation locks up a significant part of the relevant market).

The CC and CA take the view that certain exclusive dealing arrangements might be considered to have the object of harming competition when viewed in their context (see paragraph 4.14, SCR Guideline).

17 Predatory pricing

Section 21(2)(a) of the CO lists predatory behaviour towards competitors as conduct that may constitute an abuse. The SCR Guideline provides that an undertaking with SDMP engages in predatory pricing where it deliberately foregoes profits in an attempt to force competitors out of the market, or to otherwise discipline them. Adverse effects on competition will arise where there is, or is likely to be, anticompetitive foreclosure of existing competitors or new entrants.

When assessing whether predation has taken place, the authorities will typically look to identify if the undertaking is pricing below an appropriate measure of costs. The SCR Guideline distinguishes between situations in which an undertaking is:

- pricing below its average variable cost (AVC), which the CC may infer is undertaken for a predatory purpose and will likely be considered anticompetitive by object; or
- pricing below average total cost (but above AVC), which may be considered to be an infringement if there is evidence of actual or likely anticompetitive effects or a predatory strategy.

18 Price or margin squeezes

The SCR Guideline states that margin squeeze may arise where:

- a vertically integrated undertaking with SDMP supplies an important input to businesses operating in a downstream market in which the undertaking with SDMP also operates; and
- the undertaking with SDMP 'squeezes' the margin between (i) the price it charges to its downstream competitors for the input and (ii) the price its downstream operations charge customers for the products incorporating the input.

In assessing whether conduct amounts to an abusive margin squeeze, the authorities consider the extent to which:

- the upstream input is indispensable; and
- the margin allowed to rivals (ie, the difference between the price charged for the input and the undertaking's own downstream operations' sales price) is sufficient to cover the undertaking with SDMP's own downstream product-specific costs.

19 Refusals to deal and denied access to essential facilities

According to the SCR Guideline, a refusal to deal is likely to be abusive only in very limited or exceptional circumstances. Competition concerns are most likely to arise when the undertaking with SDMP competes in the downstream market with the party with whom it refuses to deal and where the input to which the refusal relates is indispensable for the competitor in the downstream market.

In assessing whether a refusal to deal is abusive the CC and/or CA may consider:

- the feasibility of the undertaking with SDMP providing the input in question;
- whether there is a history of dealings between the undertakings (termination of an existing supply arrangement might more readily be characterised as abusive); and
- the terms and conditions upon which the input are generally supplied or are supplied in other contexts.

While not specifically addressed in the CO or the SCR Guideline, a denial of access to an essential facility could potentially amount to an abuse if such denial prevented or restricted competition in a downstream market.

20 Predatory product design or a failure to disclose new technology

Neither the CO nor the SCR Guideline specifically address the question of whether, or in what circumstances, launching new (or updating existing) products or technology could amount to abusive conduct. However, the category of abusive conduct is stated to be open and it cannot be excluded that a design decision in relation to a primary product could fall foul of the SCR if it tended to foreclose competitors in a market for products that are complementary to the primary product. The risks are likely to be highest where the primary reason for designing the products in a particular way is to prevent interoperability of a rival's complementary product or the benefits of innovation are not clear.

The SCR Guideline provides that the authorities will consider a refusal to license an intellectual property right to be a contravention of the SCR only in exceptional circumstances. In addition to the factors relevant to any case of a refusal to deal (see question 19), the authorities may also assess whether a refusal to license prevents the development of a secondary market or new product, or whether it otherwise limits technical development resulting in consumer harm. If intellectual property is essential to an industry standard and an undertaking with SDMP gave a commitment at the time when the standard was adopted by the industry that it would licence the intellectual property on fair, reasonably and non-discriminatory (FRAND) terms, it may be an abuse for the undertaking to a refuse to honour it or to seek injunctive relief against a willing licensee in certain circumstances.

Update and trends

The Hong Kong Competition Ordinance came into force on 14 December 2015. While ,as at the date of writing, the authorities have yet to initiate proceedings in the Competition Tribunal, the Competition Commission has indicated that it has made substantial use of its compulsory evidence-gathering powers and several cases are progressing towards a range of potential enforcement outcomes, including the possibility of commencing proceedings in the Competition Tribunal. The Competition Commission indicated that around 20 per cent of the complaints it has received so far have raised concerns under the Second Conduct Rule, mostly relating to tying and bundling, exclusive dealing, refusal to deal and predatory pricing. The CC has stated that around 20 of the cases in which it has commenced initial assessments involve SCR issues.

21 Price discrimination

There are no laws in Hong Kong prohibiting price discrimination outside the context of the SCR.

22 Exploitative prices or terms of supply

The CC's Enforcement Policy indicates that it will accord particular priority to conduct involving exclusionary behaviour and, as noted above, the SCR Guideline is wholly focused on exclusionary conduct. Nevertheless, as the category of abusive conduct is stated to be open, it follows exploitative pricing or terms of supply could potentially be caught where they have an anticompetitive object or effect.

Exploitative conduct (including pricing or terms of supply) by a licensee in a dominant position in a telecommunications market is specifically prohibited by section 7Q of the TO.

23 Abuse of administrative or government process

Neither the CO nor the SCR Guideline specifically address the question of whether, or in what circumstances, an abuse of administrative or government process could amount to abusive conduct. However, the category of abusive conduct is stated to be open and conduct of this type may be prohibited where it has an anticompetitive object or effect.

24 Mergers and acquisitions as exclusionary practices

Section 4(2) of Schedule 1 to the CO provides that, to the extent conduct results in or would result in a merger, the SCR does not apply to that conduct.

25 Other abuses

The category of abusive conduct is stated to be open and other types of conduct may be prohibited where they have an anticompetitive object or effect.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The CC is the principal authority responsible for enforcing the SCR. The CC may do all such things as appear to it to be necessary, advantageous or expedient for, or in connection with, the performance of its functions. Specifically, the CC has power under the CO to:

- require any person to produce relevant documents;
- require any person to attend to answer questions; and
- conduct unannounced inspections under warrant.

Section 159 of the CO provides that the CA may perform the functions, powers and duties of the CC insofar as they relate to the conduct of undertakings that are licensees, or persons whose activities require them to be licensed under, or persons who have been specifically exempted from, the TO or the BO.

The CC and CA do not have the power to reach a finding of infringement of the SCR, or to impose sanctions under the CO. Instead, where they have reasonable cause to believe that a person has contravened or been involved in a contravention of, the SCR, they may initiate proceedings in the Competition Tribunal for a pecuniary penalty to be imposed.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

If, having heard a case, the Competition Tribunal is satisfied that a person has contravened or been involved in a contravention of the SCR it may order that person to pay a fine of up to 10 per cent of the turnover of the undertaking concerned for each year in which the contravention occurred (up to a maximum of three years).

In addition, the Competition Tribunal may make an order:

- prohibiting a person from engaging in the infringing conduct;
- prohibiting the withholding from any person of any goods or services;
- requiring a person to pay damages to any person who has suffered loss or damage as a result of the contravention;
- requiring any person be given access to or the right to use specified goods, facilities or services;
- requiring an account of profits; and
- disqualifying a director of a company.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The CC and CA do not have the power to reach a finding of infringement of the SCR, or to impose sanctions under the CO. Instead, where they have reasonable cause to believe that a person has contravened or been involved in a contravention of the SCR, they may initiate proceedings in the Competition Tribunal for a pecuniary penalty to be imposed.

Section 60 of the CO provides that the CC may accept from a person a commitment to take or to refrain from taking any action if it considers appropriate to address its concerns about a possible contravention of a competition rule.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

As at the date of writing, the CC and the CA have yet to initiate proceedings in the Competition Tribunal. In its press release of 14 December 2016, however, the CC indicated that it has made substantial use of its compulsory evidence-gathering powers and several cases are progressing towards a range of potential enforcement outcomes, including the possibility of commencing proceedings in the Competition Tribunal.

The CC has not indicated whether those cases involved a suspected infringement of the SCR. However, it indicated that 20 per cent of around 1,900 complaints and enquiries it has received since the implementation of the CO raised concerns under the SCR. According to the fourth Annual Report of the CC covering the period 1 April 2015 to 31 March 2016, the majority of the complaints and enquiries it received which related to the SCR involved tying and bundling, exclusive dealing, refusal to deal and predatory pricing.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

If the Competition Tribunal makes a finding that the making or the effect of a clause in a contract constitutes a contravention of the SCR, it may make any or all of the orders specified in Schedule 3 to the CO in terms it considers appropriate. For instance, it may make an order declaring that the contract to be void or voidable to the extent specified in the order, or an order requiring the parties to modify or terminate the agreement.

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31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Section 110 of the CO provides that a person who has suffered loss or damage as a result of any act that has been determined to be a contravention of the SCR may bring follow-on actions before the Competition Tribunal. Following a finding of infringement, the Competition Tribunal may make any one or more of the orders specified in Schedule 3 to the CO it considers appropriate (outlined in the answer to question 30). However, the CO prohibits any enforcement of the SCR other than by the CC and CA.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

See question 31. At the time of writing there are no precedents or guidance as to calculation of damages.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Under section 154 of the CO, an appeal lies as of right to the Court of Appeal against any decision, determination or order of the Competition Tribunal made under the CO.

Under section 7Q of the TO, CA's decisions in relation to may be appealed to the Telecommunications (Competition Provisions) Appeal Board under section 32N of the TO. Section 32Q provides that the Appeal Board's decision will be final.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Prior to implementation of the CO, firms operating in Hong Kong's broadcasting and telecommunications sectors were subject to provisions in the TO and the BO, which prohibited a licensee from engaging in conduct that has the purpose or effect of preventing or substantially restricting competition in a telecommunications market (section 7K of the TO) and the television programme service market (section 13 of the BO), respectively.

These sector-specific provisions were repealed by the CO. The conduct of telecommunications and broadcasting licensees after 14 December 2015 is now subject only to the SCR and not the TO or BO. However, pursuant to sections 3 and 4 of Schedule 9 of the CO, alleged conduct that took place (in whole or in part) prior to 14 December 2015, and which would otherwise have been regulated by the sections 7K of the TO or section 13 of the BO, may be investigated by the CA under the provisions of the BO or TO as if those sections had not been repealed.

India

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Section 4 of the (Indian) Competition Act 2002 (the Act) prohibits enterprises holding a dominant position in a relevant market from abusing such a position.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Explanation (a) to section 4 of the Act defines 'dominant position' as a position of strength, enjoyed by an enterprise, in a relevant market, in India, which enables it to operate independently of competitive forces or affect its competitors or consumers or the relevant market in its favour.

Section 19(4) of the Act sets out various factors that the Competition Commission of India (the CCI) must consider in assessing whether an enterprise enjoys a dominant position, such as market share, size of the enterprise, resources available to it, importance of competitors, economic power, commercial advantages, vertical integration, consumer dependence, entry barriers, market structure and size.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The preamble and section 18 of the Act suggests that the purpose of the Act includes ensuring fair competition in India. The standard is largely economic, with a view to preventing practices that have an appreciable adverse effect on competition, promoting and sustaining competition in markets and to protect the interests of consumers.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The Act does not provide for sector-specific regulation of dominance. Under the Act, the CCI has powers under which it can investigate unilateral conduct by dominant enterprises across all sectors.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The Act applies to all enterprises, including state-run, public entities, and departments of government that are engaged in an economic activity. However, under section 2(h) of the Act, this does not include any activity of the government relating to its sovereign functions, including activities relating to atomic energy, currency, defence and space, and such activity is, therefore, not covered by the Act.

The concept of economic activity has been construed broadly. In *Rajat Verma v Haryana Public Works (B&R) Department and Ors* (2016), the Competition Appellate Tribunal (the COMPAT) considered that the Public Works Department for the state of Haryana was to be considered an enterprise as it was engaged in an economic activity and provided services to the public. The fact that the activity was not done for profit was irrelevant. The COMPAT approvingly cited case law of the European courts to the effect that an activity of an economic nature means any activity, whether or not profit-making, that involves an economic trade.

The question of whether an activity of a department of government relates to sovereign functions is decided on a case-by-case basis. For instance, in the *Shri Surinder Singh Barmi v Board of Cricket Control of India* (BCCI) (2013) and the *Dhanraj Pillay and Others v Hockey India* (2013) decisions, the CCI found that the organisation of sporting events could not be viewed as a sovereign function. In *Shri Shubham Srivastava v Department of Industrial Policy & Promotion (DIPP), Ministry of Commerce & Industry* (2013), the CCI held that the functions performed by DIPP in relation to the formulation, promotion and approval of foreign direct investment policies amounted to the exercise of control over goods or services and, as such, the functions performed by DIPP were non-sovereign functions.

In contrast to this, in *Vineet Kumar v Ministry of Civil Aviation (MOCA)* (2013) and *Om Prakash v Central Bureau of Narcotics and others* (2013) the CCI concluded that MOCA, and separately the Central Bureau of Narcotics and the Narcotics Control Bureau respectively were not enterprises under the Act, as the functions performed by them constituted sovereign functions (such as regulation and formation of policy for the civil aviation sector, and regulating and controlling the import of poppy seeds into India and ensuring that illegally cultivated poppy seeds were not imported into India).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

As mentioned above, section 4 of the Act regulates the conduct of a dominant enterprise. It does not cover conduct by which a non-dominant enterprise becomes dominant, as it is only the abuse of a dominant position that is objectionable under the Act. However, if a qualifying merger, acquisition or an amalgamation (referred to in the Act as a 'combination') would create an entity that is dominant in the relevant market (or strengthens a dominant position), the merger control provisions (ie, sections 5 and 6) of the Act may also be applicable.

7 Collective dominance

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

The Act does not recognise the concept of 'collective dominance' by enterprises that are unrelated to each other by structural or control-based links arising from common corporate ownership. (See 'Update and trends'.)

In *Royal Energy v IOCL, BPCL and HPCL* (2012), in determining whether the actions of three oil marketing companies amounted to an infringement of the Act, the CCI explicitly held that the concept of

collective dominance was not envisaged under the provisions of section 4 of the Act. Since each company was an independent legal entity and no one company exercised control over another enterprise, the CCI also found that the three companies could not collectively form a group.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The Act does not distinguish between dominant purchasers and suppliers and the abuse of dominance provisions apply to both.

Coal India has been found to be the dominant purchaser of 'services relating to the collection, preparation and transportation of coal samples', as well as for the purchase of industrial explosives. In both cases, the CCI has recognised the freedom of a purchaser to choose its suppliers and did not find Coal India's conduct abusive.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The Act defines a relevant market to include both the 'relevant product market' and the 'relevant geographic market'.

A relevant product market is defined under section 2(t) of the Act as a market comprising all those products or services that are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Accordingly, relevant product markets are primarily defined from a demand-side perspective.

The relevant geographic market is defined under section 2(s) of the Act to consist of the geographic areas in which conditions of competition for the supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in neighbouring areas.

The CCI considers India as the broadest relevant geographic market for the purposes of the Act, even where economic factors (including significant imports) suggest a market larger than India. On the other hand, the CCI has not shied away from defining narrow markets within India based on local demand and supply conditions.

Relevant market definitions in merger cases have been held by the COMPAT not to be directly applicable in abuse of dominance cases. In the *National Stock Exchange* case (2014), it remarked that there is a fundamental difference between the two types of decisions. Merger decisions are an ex-ante review, based on an assessment of probabilities that competitive issues will arise, whereas the review in an abuse of dominance case takes place after the fact, when possible issues have become apparent.

The market share of the enterprise concerned leads the list of factors for which the CCI is to have due regard when determining whether or not an enterprise is dominant. However, there are no defined market share thresholds for a presumption of dominance. Nor are market shares determinative of dominance on their own. The CCI has considered internationally recognised principles. For example, in *Schott Glass India Pvt Ltd v Competition Commission of India* (2012) (*Schott Glass* case), the CCI considered the *Akzo* presumption of dominance where an enterprise enjoys a market share of 50 per cent or more and also the finding of dominance in the European Commission's decision in the *United Brands* case where a market share of 45 per cent was held to confer a dominant position. The COMPAT affirmed the findings of the CCI on dominance and the reliance placed on the foreign jurisprudence in appeal (2014).

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 4(2) of the Act provides that there shall be an abuse of a dominant position if an enterprise or a group:

- directly or indirectly imposes unfair or discriminatory conditions or prices in the purchase or sale of goods or services;
- restricts or limits production of goods or services in the market;
- restricts or limits technical or scientific development relating to goods or services to the prejudice of consumers;
- indulges in practices resulting in a denial of market access;
- makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- uses its dominance in one market to enter into or protect its position in other relevant markets (ie, leveraging).

In the absence of dominance, there can be no abuse; therefore, as a first step, dominance of an enterprise in a relevant market needs to be established.

As to the requirement to show anticompetitive effects, in some older cases, the CCI has considered and applied an object-based approach while finding abuse (for example, *MCX Stock Exchange*).

In more recent cases, however, the CCI and Competition Appellate Tribunal (COMPAT) have deployed an effects-based approach while evaluating abusive conduct. The following cases are illustrative.

In *Schott Glass India Pvt Ltd v Competition Commission of India & Ors*, the COMPAT found that unlawful price discrimination required a showing of both '(i) dissimilar treatment to equivalent transactions; and (ii) harm to competition or is likely harm to competition in the sense that the buyers suffer a competitive disadvantage against each other leading to competitive injury in the downstream market'. The COMPAT found the CCI had wrongly ignored the second limb and that the evidence showed there was 'no effect on the downstream market and ultimate consumer did not suffer' as a result of the alleged conduct'.

In *XYZ v REC Power Distribution Company Ltd*, the CCI noted that establishing a denial of access meant proving 'anticompetitive effect/distortion in the market in which denial has taken place'.

In *Dhanraj Pillay & Ors v Hockey India*, the CCI balanced anticompetitive effects against the defendant's justifications. The CCI held that the Act was not violated where allegedly abusive contractual restrictions were not disproportionate to a sporting organisation's legitimate regulatory goals.

Finally, in *ESYS Information Technologies Pvt Ltd v Intel Corporation & Ors*, the CCI dismissed section 4 claims based on Intel's distribution agreements in part because 'the distributors of Intel products are not precluded from dealing in the products of its competitors and in fact they were found dealing in the competing products' and therefore 'there is no question of foreclosure of market for the competitors of Intel.'

In summary, the more recent CCI and COMPAT jurisprudence reflects a move away from rigid form-based analysis. Instead, the CCI is increasingly requiring proof of anticompetitive effects in its enforcement action.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Although not expressly stated as such, section 4 is drafted widely enough to cover both exploitative and exclusionary practices. The CCI, in *HT Media Ltd v Super Cassettes Ltd* (2014) (*HT Media* case), observed that pricing abuses may be 'exclusionary' (ie, pricing strategies adopted by dominant firms to foreclose competitors), or 'exploitative' (ie, which cover instances where a dominant firm is accused of exploiting its customers by setting excessive prices). In this case, the CCI held the minimum commitment charges (MCC) imposed by Super Cassettes Industries Limited (SCIL) to be both exploitative and exclusionary.

Exploitative abuses, such as excessive pricing and unfair terms of contract, have been considered in various cases by the CCI. In *Shri Shamsher Kataria v Honda Siel Cars India Ltd & Ors* (2014) (*Auto Parts* case), the CCI considered the passenger vehicle market and the after markets comprising spare parts, diagnostic tools and provision of after-sales repair and maintenance services. It found that 14 car companies had abused their dominant positions in their respective after markets by requiring customers to purchase spare parts and diagnostic tools solely from the respective car manufacturer or its authorised

dealers. The CCI held that this amounted to a denial of market access to competitors, applying the essential facilities doctrine. The CCI also found that the car manufacturers had engaged in excessive pricing of their spare parts. This finding has been confirmed by the COMPAT (2016). On appeal, the Supreme Court has stayed operation of the COMPAT's judgment.

In the *Coal India* case (2014), the CCI found that Coal India, which had a state-sanctioned monopoly on coal supplies, had charged unfairly high prices to its customers, relying on a formula that purported to be based on Coal India's costs but in fact allowed it to charge far higher rates. On appeal, this was upheld by the COMPAT (2016).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The CCI is not required to demonstrate the nexus between abusive conduct and dominant position. It appears that any conduct, as set in response to question 11 above, could amount to an abuse if committed by a dominant enterprise.

It is also not necessary for the dominance to exist in the same market where the effects of the anticompetitive conduct are felt. Section 4(2)(e) of the Act provides that there shall be an abuse of a dominant position if the dominant enterprise uses its dominant position in one relevant market to enter or protect another relevant market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The only explicit defence that is listed in the Act is the 'meeting competition' defence for discriminatory prices or conditions. This defence enables enterprises in dominant positions to respond to moves made by their competitors. For example, the Hon'ble Commission allowed the discounts charged by a port operator, noting that they were designed to meet the competition from other port operators in the relevant market. *Dhruv Suri v Mundra Port & Special Economic Zone Ltd*, CCI Order dated 29 December 2010 in Case No. 18 of 2009.

The Act does not provide for an objective justification defence; however, the CCI has considered justifications in limited circumstances. In the *Schott Glass* case (2012), the CCI held that Schott Glass was within its rights to cease supplies to a customer in order to protect its trademarks and that its refusal to supply to such customer was objectively justified. In the *Schott Glass* appeal (2014), the COMPAT also observed that the grant of more favourable target discounts to a customer who provides more business may not be anticompetitive, provided no harm is caused to competition in the market. However, where conditions for granting such discounts were dissimilar for equivalent transactions, then it would cause anticompetitive effects in the market. Though target discounts, coupled with fidelity rebates (discounts offered as a counterpart of a commitment from the purchaser to place all or most of its orders with the seller) can be a persuasive horizontal exclusionary device aimed at foreclosing competition, in this case they were justified since Schott Glass offered the discount to an entity that was purchasing a larger quantity of the product and, thus, did not qualify as an equivalent transaction. Further, the discount policies and agreements were aimed at ensuring better quality in the face of competitive pressures from Chinese counterparts. The rationale for granting such favourable terms was based in efficiency and economies of scale.

In *Faridabad Industries Association (FIA) v M/s Adani Gas Limited (AGL)* (2014) (*Adani Gas* case), the CCI held that a restriction imposed by a dominant enterprise may not be abusive if such dominant enterprise is imposing such restriction because it is subject to the same restriction by a third party.

In *Auto Parts* (2016), the COMPAT refused to accept that the car manufacturers' limited distribution of their spare parts was justified to prevent counterfeiting and their installation by unskilled independent repairers. The COMPAT held that, although this was a legitimate concern, consumers would be better served if inexpensive spare parts were made readily available on the open market, reducing the potential demand for counterfeits. The COMPAT required the government to intervene and develop quality standards for repairers. On appeal, the Supreme Court has stayed the COMPAT's judgment.

Specific forms of abuse

14 Rebate schemes

The Act does not specifically cover discounts and rebate schemes. However, rebate schemes may be looked at from the perspective of unfair or discriminatory prices and conditions, or other exclusionary practices (eg, that limit or control production of goods and supply of services or are practices that result in the denial of market access), and therefore may be covered under the Act.

In the *Intel* case (2014), the CCI found that Intel's incentive and target schemes did not foreclose competitors, and that this was reflected in the distribution of competing microprocessors by Intel's distributors and OEMs. The complainant's allegation that distributors were restricted from dealing in competing products was found to be unsubstantiated. Further, the CCI observed that Intel's incentive schemes were targeted at increasing sales of low-demand products and offered non-predatory discounts to meet competition, all of which were found to constitute reasonable business practices.

15 Tying and bundling

Unilateral tying and leveraging are considered abusive under section 4(2)(d) and section 4(2)(e) of the Act.

In *Sonam Sharma v Apple* (2013), the CCI set out the conditions for an abusive tie under section 3(4) of the Act (which deals with anticompetitive vertical agreements):

- the presence of two separate products or services capable of being tied. The purchase of a commodity must be conditioned upon the purchase of another commodity;
- the seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and
- the tying arrangement must affect a 'not insubstantial' amount of commerce: a tie-in arrangement is only considered to be abusive if a 'substantial' portion of the market is affected.

The COMPAT in *Schott Glass* (2014) held that for an abusive tie-in arrangement under section 4(2)(d) of the Act to be made out, the tied product and tying product must be entirely different and have no connection to each other in their application.

16 Exclusive dealing

Exclusive dealing, non-compete provisions and single branding restrictions could constitute abuses of dominant position, as they would all be characterised as practices that result in the denial of market access as covered by section 4(2)(c) or limiting production or technical development as covered by section 4(2)(b). The CCI is increasingly analysing the foreclosure effect of such conduct as a requirement under section 4 of the Act (see response to question 10).

17 Predatory pricing

Explanation (b) to section 4 of the Act sets out a two-step test for assessing whether a dominant enterprise's conduct is predatory. First, the price must be below cost (as determined by CCI regulations) and second, the dominant enterprise must have the intention to reduce competition or eliminate competitors.

The CCI has published regulations on determining the cost of production, which state that the default cost benchmark is average variable cost (as a proxy for marginal cost). However, the CCI and the Director General (DG) may consider other cost measures such as avoidable cost, long run average incremental cost and market value, depending on the nature of the industry, market and technology used, with reasons provided in writing.

In *National Stock Exchange of India Ltd (NSE) Competition v Commission of India* (2014) (NSE case), the COMPAT found zero pricing by the NSE in the currency derivatives trading segment to be predatory pricing.

In two subsequent cases involving predatory bidding, *M/s Transparent Energy Systems Pvt Ltd v TECPRO Systems Ltd* (2013) and *HLS Asia Limited, New Delhi v Schlumberger Asia Services Ltd, Gurgaon & Ors* (2013), the CCI held that predatory pricing had to be assessed on

the basis of an appropriate cost benchmark (ie, average variable cost), as reduction of prices in itself was actually the essence of competition. The CCI also observed that the abuse of predatory pricing had to be assessed on the basis of actual prices and not projected prices.

The CCI has opened an investigation into Ola Cab's activities, on the strength of a complaint accusing it of predatory pricing, giving discounts to passengers and incentives to drivers on a scale such that it was operating at a loss in Bengaluru.

18 Price or margin squeezes

Price squeezes, although not specifically referred to in the Act, would be covered where they amount to unfair or discriminatory pricing terms under section 4(2)(a)(ii) of the Act and denial of market access under section 4(2)(c) of the Act.

In 2016, the CCI opened an investigation into the activities of Grasim Industries for allegedly abusing its dominant position in the market for man-made fibres in India. The informant alleged that Grasim was abusing its dominant position by engaging in discriminatory pricing, offering lower prices to manufacturers that were exporting their products, and higher prices to those selling goods intended for the domestic market, and which would therefore be competing with Grasim's own downstream garment business.

19 Refusals to deal and denied access to essential facilities

A refusal to deal has been defined in the context of a vertical arrangement under section 3(4)(d) of the Act as 'any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought'. In the *Auto Parts* case (2014), a fine of 25.44 billion rupees was imposed on 14 car manufacturers for restricting the sale of car spare parts in the open market. This conduct was held to be both, (i) an abuse of dominance, as being a denial of market access under section 4(2)(c) of the Act, and (ii) a refusal to deal, on account of imposing restrictions through agreements, under section 3(4)(d) of the Act. On appeal, however, the COMPAT mandated the companies to pay a 2 per cent penalty on average annual turnover of spare parts in the aftermarket. The CCI is yet to determine this amount. The COMPAT's judgment was stayed by the Supreme Court on appeal.

Access to essential facilities would be covered under practices resulting in a denial of market access under section 4(2)(c) and possibly section 4(2)(b), which prohibits limitations or restrictions on the production of goods or provision of services or technical or scientific development relating to goods or services to the prejudice of consumers.

In *Arshiya Rail Infrastructure Ltd v Ministry of Railways* (2013), the complainants had alleged that railway infrastructure was an essential facility and that the Ministry of Railways' refusal to provide access to this rail infrastructure amounted to an abuse of dominance. The CCI found that the essential facility doctrine could be invoked upon an appraisal of the technical feasibility to provide access, the possibility of replicating the facility in a reasonable period of time, the distinct possibility of lack of effective competition if such access was denied and the possibility of providing access on reasonable terms. Only if these legal conditions are satisfied can a refusal to deal constitute an abuse under section 4. In this case, in relation to access to railway infrastructure, the CCI found that there were no technical, legal or even economic reasons why container train operators could not create their own terminals or similar facilities. The CCI therefore dismissed the complainants' allegations of abuse.

Further, in the *BCCI* case (2013) the CCI provided interesting insight into the interpretation of the essential facilities doctrine in India. The CCI found that BCCI had misused its role as the regulator of cricket in India to restrict economic competition in sporting events. The CCI appears to suggest that a restriction of access by a dominant enterprise to necessary infrastructure (which may be considered as an essential facility) to the detriment of competitors can amount to refusal to deal. This case has been remanded by the COMPAT to the CCI for reconsideration on certain procedural grounds.

20 Predatory product design or a failure to disclose new technology

Although reasonable conditions for the protection of intellectual property rights (IPRs) are not restricted by the Act with respect to anticompetitive agreements, there is no such explicit mention of IPRs in the abuse of dominant position provisions of the Act. An unreasonable unilateral refusal to license an IPR or discriminatory price between two enterprises can constitute an abuse of dominant position if these actions result in the imposition of an unfair condition or price, denial of market access, limiting production, technical or scientific development or price discrimination, or a combination of any of these.

In the *Auto Parts* case (2014), the CCI held that an unreasonable denial of market access by a dominant company cannot be defended on the basis of holding IP rights and would be considered abusive under section 4.

In the *HT Media* case (2014), the minimum commitment charges imposed by SCIL was considered exploitative and an abuse of SCIL's intellectual property right by the CCI because private FM radio stations had to pay the MCC irrespective of their actual play-out, which could be lower than the MCC.

The CCI is currently investigating the potential abuse of a dominant position by Ericsson, on the basis that as the holder of a standard essential patent, it was bound by the commitments to license on fair, reasonable and non-discriminatory terms it had entered into while participating in the standard-setting process. Failure to abide by those commitments could amount to an abuse of dominance, as has been found in other jurisdictions.

21 Price discrimination

Section 4(2)(a)(i) of the Act prohibits non-price discrimination and section 4(2)(a)(ii) prohibits price discrimination.

The COMPAT, in the *Schott Glass* case (2014), has found that the abuse of price discrimination involves the satisfaction of two ingredients: dissimilar treatment of equivalent transactions and harm to competition or likely harm to competition by which buyers suffer disadvantage against each other. The COMPAT provided further guidance on conduct that may be considered as discriminatory by noting that '[t]he price and conditions could be said to be discriminatory, if and only if, they were different for the same quantities of the same product.' The COMPAT's approach to discriminatory conduct has been followed by the CCI in the *Intel* case, where the CCI observed that:

> *[i]t appears to be a common business practice to give better discount to the bulk purchase and unless it impedes the ability of the reseller to compete any competition may not probably arise... the alleged pricing policy of Intel does not amount to secondary line price discrimination and has not resulted in foreclosure of any of its downstream customers.*

Further, in *Singhania & Partners LLP v Microsoft Corporation (I) Pvt Ltd & others* (2011), the CCI (and, on appeal, the COMPAT in 2012) found that the prices imposed by Microsoft for different types of licences (OEM licences, volume licences and retail licences) granted to different categories of customers did not amount to price discrimination as the different licences giving customers different rights of use were, in fact, different products. Similarly, in *Travel Agents Federation of India v Lufthansa Airlines* (2010), where the prices of Lufthansa tickets on its official website were different from the fares made available to appointed travel agents, the CCI found that the sale of airline tickets through travel agents and through Lufthansa's official website constituted two distinct markets and mediums and, consequently, the different fares did not amount to price discrimination.

In opening its investigation against Ericsson (2015), the CCI found that the licences charged by Ericsson, besides, on the face, being a breach of its commitments to licence on fair, reasonable and non-discriminatory terms, were also discriminatory. The royalty rate being charged by Ericsson had no link to the functionality of the patented product; rather it was based on the final price of the manufactured product in which the patent was being used. Accordingly, charging of two different licence fees per phone for use of the same technology was held to be discriminatory by the CCI and an investigation has been ordered into Ericsson's conduct.

22 Exploitative prices or terms of supply

Exploitative abuses, such as excessive pricing and unfair terms of contract, have been considered in various cases by the CCI. In the *Auto Parts* case (2014), the CCI found that 14 car companies had abused their dominant positions by requiring customers to purchase spare

parts and diagnostic tools solely from the respective car manufacturer or their authorised dealers. The COMPAT, while deciding the appeal, agreed with the CCI's analysis that the margins from spares business substantially exceed the margins from the business of selling cars substantially and held that the car companies were charging an unfair price in the spare-parts market. On appeal, the Supreme Court has stayed the COMPAT's judgment.

On the contrary, the COMPAT's decision in the *Orissa Steel Federation* case (2016) follows the approach of the EU courts to excessive pricing: it is not enough for the CCI to argue that a price is excessive, but it must also show unfairness. Besides the costs, the CCI should also consider the difference between what the dominant firm and other firms can charge, what different customers pay, whether customers can still be profitable, and whether there is a shortage of supply (in which case high prices may be an efficient method of allocating the product).

As mentioned above, in the *HT Media* case, the CCI considered the minimum commitment charges imposed by SCIL as exploitative.

23 Abuse of administrative or government process

Section 4 of the Act may cover abuses in the nature of sham litigation that result in denial of market access and limiting production, technical or scientific development.

In the case of *Bulls Machines v JCB India Ltd (JCB)* (2014), Bulls Machines filed a complaint before the CCI alleging abuse of judicial process by JCB to exclude competitors. The complaint was filed due to proceedings initiated by JCB before the High Court of Delhi alleging infringement of the design registrations and copyright of JCB by Bulls Machines in developing the backhoe loader 'Bull Smart'; JCB obtained an ex parte injunction against Bulls Machines on the basis of alleged design infringements. The injunction proceedings were later withdrawn by JCB as they appeared to have misrepresented the facts of the infringement of their design before the High Court of Delhi. The CCI found there was a prima facie case that JCB had abused its dominant position in the manufacture and sale of backhoe loaders in India by initiating these proceedings and directed the DG to proceed with the investigation.

24 Mergers and acquisitions as exclusionary practices

Although structural abuses are not specifically dealt with under the abuse of dominance provisions in the Act, the merger control provisions of the Act require mandatory pre-notification of combinations that cross certain financial thresholds contained in section 5 of the Act. Combinations that cause or are likely to cause an appreciable adverse effect on competition in India are void.

Mergers and acquisitions that do not meet these financial thresholds may be assessed under section 3 of the Act for entering into anti-competitive agreements or under section 4 of the Act for an abuse of dominance; however, no transaction has been reviewed under these provisions to date. Section 4(2)(c) of the Act may be wide enough to capture any form of denial of market access, including through mergers and acquisitions, if they are exclusionary.

25 Other abuses

Section 4(2) appears to set out an exhaustive list. However, the provisions dealing with abuse of dominance under the Act are fairly broad and the abuses listed under section 4(2) of the Act could, in fact, cover almost all types of abuse.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Under the Act, the CCI is responsible for enforcement of the provisions of the Act, with appeals to its decision lying before the COMPAT and the Supreme Court of India. Investigative powers of the CCI include:

- summoning and enforcing the attendance of any person and examining him or her on oath;
- requiring the discovery and production of documents or material objects;
- receiving affidavit evidence;
- issuing commissions for the examination of witnesses or documents (a commission in this context refers to an officer to examine witnesses or documents that cannot be brought to the office of the investigating authority for some reason); and
- requisitioning of any public record or document, or copy of a public record or document, from any office.

The investigation wing of the CCI also has powers of search and seizure, which include the use of reasonable force to enter premises, examination of seizure of documents and electronic equipment, and the taking of statements in relation to the subject matter of the investigation.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Under the Act, the CCI is empowered to:

- impose a penalty not exceeding 10 per cent of the infringing dominant enterprise's average turnover for the preceding three financial years;
- pass cease-and-desist orders;
- order the division of a dominant enterprise to prevent an abuse of such dominant position; and
- pass any orders the CCI deems fit.

Further, the CCI has the power and jurisdiction to pass appropriate interim orders pending investigation. Contravention of the CCI's orders can invite further financial penalties and even criminal sanctions punishable by additional fines or imprisonment of up to three years, or both. The CCI may also impose significant fines for withholding information and providing false information.

Under the provisions of section 48 of the Act, individuals in charge of an enterprise contravening the provisions of the Act, or individuals aiding the commission of such contraventions, shall be liable to be proceeded against and punished under section 27 of the Act. The CCI has previously penalised individuals for being in charge of a company found to have abused a dominant position. Having said that, presently, there are challenges pending before the High Court of Delhi on whether individual liability under the Act is for contravening the provisions of the Act or the liability arises only in the event the CCI's orders are not complied with.

The highest fine ever imposed by the CCI for abuse of dominance was in the *Auto Parts* case, where a cumulative fine of 25.44 billion rupees (ie, 2 per cent of average annual turnover) was imposed on 14 car manufacturers. On appeal, however, the COMPAT mandated the companies to pay a 2 per cent penalty on the average annual turnover of spare parts in the aftermarket. The CCI is yet to determine this amount. The COMPAT's judgment was stayed by the Supreme Court on appeal. The highest fine ever imposed by the CCI for abuse of dominance on individuals was in *Shivam Enterprises v Kiratpur Sahib Truck Operators Co-operative Transport Society Limited and Ors* (2015), where a cumulative fine of 112,297 rupees was imposed on eight individuals.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The CCI and the COMPAT can directly impose sanctions without recourse to courts or other authorities.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Given the complexities involved in establishing abuse of dominance cases, the CCI and the COMPAT have been bold in finding violations since they were granted their enforcement powers. In fact, the first two major violation cases of both, the CCI and the COMPAT, were dominance cases in *DLF Ltd v Competition Commission of India and Others* (2014) & *NSE* case. The past year, however, was at risk of being quiet on this front with only one significant decision in the *REC* case being published till November 2016. December 2016, however, resulted in the COMPAT upholding the CCI's decision in the *Auto Parts* case and directing the DG to investigate a number of cases that the CCI prima

Update and trends

There is potential for a significant overhaul of the Act, given the pending constitutional challenge to the Act pursuant to the *Auto Parts* decision. In the event that the government or the courts cause such an overhaul, we would expect structural and procedural changes to the functioning of the CCI.

Since coming into being, the CCI has established itself as an authority that is not afraid to penalise both private and public enterprises. We expect similar headline-grabbing decisions and penalties in the future, given the size and importance of enterprises currently under investigation. The power to impose high and wide-ranging penalties also comes with an increased obligation to follow due process. The CCI has been reprimanded by the COMPAT for not following the principles of natural justice and we expect parties to be given a more robust right to be heard.

In terms of sectoral focus, the CCI has recently called for an expression of interest for a baseline study and survey in the pharmaceutical sector, and healthcare delivery systems and services in Delhi and the National Capital Region, to collect information and credible evidence on competition issues in the sector and present the same in an analytical manner. Specifically, the CCI has indicated that it would focus on various issues including non-availability of essential medicines, increasing price of drugs, the nexus between pharmaceutical companies and pharmacists, pharmacists and doctors, doctors and pathological laboratories, doctors and pharmaceutical companies, and hospitals and insurance companies. This study could be used for suo moto investigations by the CCI.

Further, the CCI is closely monitoring the technology sector, which includes ongoing investigations into standard essential patents licensing, online search and search advertising, and online platforms for e-commerce and radio taxi aggregation. The CCI also tends to focus on sectors such as real estate, which directly affect consumers.

The government had sought to introduce the concept of 'collective dominance' into the law, through the now lapsed Competition (Amendment) Bill 2012. This would have meant that two or more enterprises unrelated by ownership or control could be held to be dominant. There are discussion of introducing new legislation to make this a reality.

facie decided to close. These investigations are expected to take the standard six months to one year with a final order expected within a year of completion of the investigation.

In terms of the *Auto Parts* case, the COMPAT upheld the CCI order and found 14 automobile manufacturers guilty of abusing their dominant position and entering into anticompetitive vertical agreements with their original equipment suppliers (OES) and authorised service providers.

While delineating the relevant market in the *Auto Parts* case, the CCI accepted the aftermarkets definition, as opposed to the concept of unified systems market definition advocated by the automobile companies to argue that the sale of cars and spare parts together constitute a single market. The CCI rejected the systems market definition primarily on two grounds – firstly, the consumers or buyers in the primary market (ie, the market for the manufacture and sale of cars) do not undertake (and are not capable of undertaking) whole life cost analysis when buying the automobile in the primary market; and secondly, 'reputation effects' do not deter the automobile companies from setting supra competitive prices for spare parts.

Proceeding to the determination of dominance of the automobile companies in the aftermarkets, the CCI observed that owing to the technical specificity of the cars manufactured by each automobile manufacturer, the spare parts of a particular brand of an automobile could not be used to repair and maintain cars manufactured by another automobile manufacturers, thus diminishing the inter-brand substitutability of spare parts among cars manufactured by different automobile manufacturers. The CCI further observed that each automobile company had entered into various agreements with their overseas suppliers or OES to ensure that they become the sole supplier of their own brand of spare parts and diagnostic tools in the aftermarket. Accordingly, the CCI held that each automobile company was a dominant entity in the aftermarket for its genuine spare parts and diagnostic tools and correspondingly in the aftermarket for the repair services of its brand of automobiles.

In conclusion, the CCI held that the automobile companies abused their dominant position in the aftermarkets by – (i) imposing discriminatory conditions on the supply of spare parts; (ii) denying market access to independent repairers and other multi-brand service providers; and (iii) leveraging their dominance in the relevant market for the supply of spare parts to protect the relevant market for after-sales service and maintenance.

The COMPAT upheld the CCI's directions to the automobile companies to remove restrictions imposed through agreements and practices on OES for selling spare parts, including diagnostic tools, in the aftermarket and open additional distribution channels to the open market for spare parts on a country-wide basis.

The COMPAT also recognised the regulatory vacuum relating to standards for spare parts and repair services. It recognised the CCI's concerns for a formal institutionalised mechanism to develop organised garages so that independent repairers, who are willing to take up automotive repair works or spare services on a multi-brand basis, could establish their businesses. Accordingly, the COMPAT, in an unprecedented move, directed the Ministry of Road Transport and Highways (MRTH) to develop voluntary standards for certification of garages or independent repairers, and the MRTH, in consultation with other relevant government departments, agencies and industry organisations, to take up a programme for standardisation of automobile spare parts. In regad to these directions, the COMPAT further directed the CCI to review the progress and action taken by government departments or ministry, every three months and send a report to the COMPAT for further directions.

With respect to the monetary penalty imposed on the automobile manufacturers, the COMPAT reiterated its position that the penalty is to be calculated on the basis of the relevant turnover and not the total turnover.

These directions impose a heavy and continuous compliance burden on the manufacturers as well as on the CCI. The question as to whether the CCI is the appropriate body to enforce such compliance remains to be seen.

On appeal, however, the Supreme Court has stayed the operation of the COMPAT's judgment.

It is important to note that the COMPAT keeps a strict watch on the orders passed by the CCI, with an increasing focus on the CCI's failure to comply with the principals of natural justice. This has resulted in a number of matters being remanded to the CCI to be reheard keeping such principals in mind. The COMPAT, in *Sh Sunil Bansal & Ors v Jaiprakash Associates and Jaypee Infratech Limited* (2016), set aside the order passed by the CCI for violation of the principles of natural justice, and directed the CCI to consider the matter afresh. The COMPAT found that given that the DG had found a violation, the CCI ought to have informed the informants that they were minded to disagree with the DG, giving the informant an opportunity to defend the DG's findings.

In *Gujarat Industries Power Company Limited v Competition Commission of India and others* (2016), the COMPAT set aside the order of the CCI refusing investigation against Gas Authority of India Limited (GAIL) and directed the DG to conduct an investigation into the allegations against GAIL. The COMPAT concluded that the exercise undertaken by the CCI to determine the issues such as relevant market, dominant position enjoyed by GAIL in the relevant market and its conclusion that GAIL cannot be held to have abused its dominant position was clearly beyond the scope of the power required to be exercised by the CCI at the stage where it is only required to prima facie decide whether a violation of the Act has occurred. The COMPAT's order has been appealed to the Supreme Court, which has directed the parties to maintain status quo till final disposal of the appeal.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Following a finding of abuse of dominance, under section 27 of the Act, the CCI is empowered to:

- impose a penalty not exceeding 10 per cent of the infringing dominant enterprise's average turnover for the preceding three financial years;
- pass cease-and-desist orders;
- order the division of a dominant enterprise to prevent an abuse of such dominant position; and
- pass any orders the CCI deems fit.

The CCI, in *Belaire Owner's Association v DLF Limited* (2011), held that DLF abused its dominant position in the market for 'high-end residential properties in Gurgaon' by imposing unfair conditions in the Apartment Buyer's Agreement (ABA) for the sale of its services to consumers. Further, the CCI held the unfair conditions to be in contravention of section 4 and thus, ordered modification of the same. On appeal, the COMPAT (2014) upheld the CCI's order that DLF abused its dominant position in the market. However, the COMPAT refused to look into and consider the validity of the ABAs, which were entered into prior to the Act coming into force, and were voluntarily executed, without the element of compulsion.

In this regard, inference can be drawn from the COMPAT's decision in the *Auto Parts* case. The COMPAT, in the *Auto Parts* case, directed the automotive manufacturers to remove all restrictions on supply of spare parts, rather than invalidating the entire supply contracts or modifying the relevant clauses that were held to be in contravention of section 3(4).

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The CCI and the COMPAT are exclusively responsible for enforcing the provisions of the Act.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Under section 53N of the Act, any person, enterprise or government harmed by the conduct of an enterprise under section 4 can approach the COMPAT for compensation on the basis of an order of the CCI or COMPAT finding a contravention of the Act.

The Act further provides that class actions for compensation may also be instituted. The procedure to be followed in such cases will be the same as the procedure for class actions already present under Indian civil procedure.

Presently, the COMPAT is considering the compensation claim filed by MCX Stock Exchange Ltd against the NSE, on account of alleged losses suffered owing to the zero-pricing strategy adopted by the NSE in the currency derivatives segment.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Under section 53A of the Act, the CCI's decisions finding an abuse may be appealed to the COMPAT. Further, under section 53T of the Act, any decision or order of the COMPAT may be appealed to the Supreme Court of India only on the point of law.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

In India, there are no rules applying to the unilateral conduct of a non-dominant firm.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Law 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (Indonesian Competition Law, ICL) is the primary legislation covering the behaviour of dominant firms.

While many competition law regimes rely on the concepts of market dominance or dominant position, ICL only employs the term 'dominant position' in articles 1(4) and 25 and in the title of Chapter V, which contains article 25. However, the concept of dominant position appears in several more articles: article 4 (prohibiting oligopolies), article 13 (prohibiting oligopsonies), article 15 (prohibiting exclusive agreements), article 17 (prohibiting monopolies), article 18 (prohibiting monopsonies), article 19 (prohibiting market control), article 20 (prohibiting predatory pricing), and in the articles that comprise the remainder of Chapter V: article 26 (prohibiting interlocking directorships), article 27 (prohibiting cross-ownership) and article 28 (regarding mergers, consolidations and acquisitions) (together, dominance-related articles).

Under ICL, the Commission for the Supervision of Business Competition (KPPU) has delegated authority to issue regulations (Guidelines) to implement ICL.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

ICL article 1(5) defines a business actor as a person or entity, established and domiciled, or that engages in activities, in Indonesia, that individually or with others by agreement engages in business activities.

ICL provides two definitions of dominance. Article 1(4) provides that a business actor will occupy a dominant position if it has:

- no substantial competitor in the relevant market; or
- the strongest position of its competitors in the relevant market as judged by its financial capacity, access to supplies or sales and ability to adjust the supply or demand levels to certain goods or services.

Article 25(2) provides that a business actor or a group of business actors, will occupy a dominant position if it:

- controls at least 50 per cent of the market for a good or service; or
- together with two or three business actors, or two or three groups of business actors, controls at least 75 per cent of the market for a good or service.

Articles 1(4) and 25(2) should, if possible, be read together, rather than as inconsistent definitions. It should be noted here that ICL is frequently ambiguous – the interpretive tension between these two sub-articles provides but one example.

In assessing market dominance, KPPU will consider all market structure elements, such as market share, barrier to entry, and rivals' positions. ICL does not specifically recognise different dominance types.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The object of ICL is not strictly economic, although economics play a very important role in the interpretation and application of the dominance provisions. In KPPU hearings, business actors increasingly call economists as expert witnesses. Most, if not all, proceedings will involve the calling of such witnesses, whose evidence is often of high importance to the matter's outcome.

While many other competition legal regimes have a single object, ICL has several, including:

- safeguarding the 'public interest', increasing national economic efficiency and enhancing consumer welfare;
- creating a business climate conducive to business opportunities (including small and medium-sized enterprises);
- preventing monopolistic and unfair business practices; and
- 'creating effectiveness and efficiency in the carrying out of business activities'.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The provisions prohibiting abuses of dominant position and the dominance-related articles apply to all business sectors. However, the central government has also issued sector-specific regulations. KPPU plays a significant role in enforcing such regulations and providing sound competition policy recommendations tailored to specific sectors.

ICL takes precedence over sector-specific regulation to the extent of any inconsistency. As the agency primarily responsible for enforcing competition law, KPPU works together with other regulators and government agencies in dealing with specific sectors, and to ensure that all competition regulations are drafted and enforced consistently.

For instance, in handling competition in the banking and finance industry, KPPU works closely with the Financial Services Authority and the central bank, Bank Indonesia. In respect of the oil and gas industry, KPPU works closely with the Upstream Oil and Gas Special Task Force. As for the telecommunications industry, KPPU works closely with the Indonesian Regulatory Telecommunications Agency.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance provisions apply to business actors (which again ICL article 1(5) defined as persons or entities, legal or otherwise, established and domiciled, or that engage in activities, in Indonesia, that individually or with others by agreement engage in business activities in the economic sphere).

ICL also applies to state-owned enterprises (SOEs) and institutions formed or appointed by the government. Article 51 provides that SOEs and such institutions may only maintain a monopoly or other competitive advantage if:

- their activities relate to the production or marketing of goods or services that affect the livelihood of society at large and involve branches of production of strategic importance to the state; and
- the matter has been specifically provided for by law.

Article 51 Guidelines stipulate that SOEs granted monopoly rights shall not abuse those rights.

Public entities, which are defined as government bodies or agencies, local, central or national, which have in the public interest been delegated duties, functions, or powers by law or regulation, are exempted from ICL. However, if a public entity regulates competition-related matters and KPPU determines that this may breach ICL or create anticompetitive effects, KPPU may recommend or order that the entity issue an amending regulation so as to comply with ICL.

ICL article 50 exempts cooperatives, which 'specifically serve their members', and 'small scale' business actors.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

ICL provides for the behaviour of firms that are already dominant, and behaviour through which a non-dominant company becomes dominant. Article 25 and the dominance-related articles may apply to practices that have as their object or effect the creation or establishment of a dominant company. For instance, if a business actor is found to breach Article 19 (prohibiting market control), this may indicate to KPPU that the business actor has become a dominant company.

7 Collective dominance

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

Collective dominance is covered by both sub-articles 25(2)(a) and (b). Two or three business actors or two or three groups of business actors will only be regarded as together controlling a certain percentage of a relevant market if they employ the same strategies or policies in that market. For example, two independent business actors who employ the same pricing policies will be deemed to collectively control the sum of the percentages of the market they individually control. This control may be considered as collective dominance, and deemed so even in the absence of an explicit agreement between the business actors.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

ICL applies to dominant purchasers. Article 18 prohibits monopsonies, by providing that a business actor is prohibited from 'controlling the acquisition of supplies' or acting as the sole buyer of a good or service in a relevant market, if this would involve 'monopolistic' practices or result in unfair business competition in the relevant market.

ICL treats dominant suppliers similarly. Article 17 prohibits monopolies, by providing that a business actor is prohibited from 'controlling the production or marketing' of a good or service in a relevant market, if this would involve monopolistic practices or result in unfair business competition.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

ICL's definition of the 'relevant market' is roughly consistent with the definition of 'market' adopted by several regimes regulating competition in other jurisdictions.

The 'relevant market' is a range of products marketed in a given geographical area. This composite definition contemplates a market defined by both its location (geographical element) and its range of products (product element).

The geographical element refers to an area in which business actors actually sell their products or, more broadly, an area in which such products are available or to which such products are capable of being distributed. The product element consists of a range of products that are the same, of the same type, or can be substituted for one another. Products are regarded as substitutes for one another when consumer opinion is that the products are sufficiently similar in function, size, use, price, or other key characteristic. Products may also be so regarded when supplier opinion is that a new supplier of a competing product is sufficiently able to bring that product to the relevant market.

ICL's definition of the 'relevant market' does not differ for merger control purposes.

As above, ICL article 25(2) provides that a business actor, or a group of business actors, will occupy a dominant position if it:

- controls at least 50 per cent of the market for a good or service; or
- together with two or three business actors, or two or three groups of business actors, controls at least 75 per cent of the market for a good or service.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

ICL Article 25(1) prohibits entities from using a dominant position directly or indirectly to:

- set trading terms, with the aim of preventing or barring consumers from obtaining goods or services on a competitive basis, with regard to price or quality;
- limit markets or technological innovation; or
- bar potential competitors from entering the relevant market.

Although it is not apparent from the text of the prohibition, it is KPPU policy to follow an effects-based approach. This means that an activity of a business actor in a dominant position will only be considered an abuse if it involves monopolistic practices or results in unfair business competition in the relevant market. It will not be considered an abuse of dominance if it contributes to the success of the business by efficiency improvements or innovations, as opposed to the exclusion of competitors.

The test for whether there has been an abuse of a dominant position is objective. No anticompetitive intent is required, although its existence may be of importance in determining whether there has been an abuse.

Price fixing (article 5) and exclusive dealing (article 15) are prohibited per se, regardless of whether they have an anticompetitive effect on the market.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices. ICL article 17 (prohibiting monopolies) has frequently been used by KPPU to capture allegations of exploitative practices conducted by dominant firms, while articles 19 (prohibiting market control) and 25 (prohibiting abuses of a dominant position) have been used to capture allegations of exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

ICL article 25 prohibits a business actor from abusing its dominant position, either directly or indirectly. No direct causal link between the abuse and dominant position is required.

A business actor's conduct may also be abusive, even if the conduct occurs in a market adjacent to the dominated market. For example, article 15(2) prohibits tying and bundling, by prohibiting a business actor from entering into an agreement with another business actor that provides that the business actor receiving a good or service must be willing to buy another good or service from the business actor that supplied the original good or service.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

ICL does not provide any defences. However, most of the provisions prohibiting abuses are subject to the rule of reason, such that an activity of a business actor in a dominant position will only be considered an abuse if it involves monopolistic practices or results in unfair business competition in the relevant market.

There is limited guidance on how KPPU will determine whether an agreement (or instance of coordination) involves monopolistic practices or results in unfair competition. However, KPPU guidelines do provide a list of factors, which KPPU considers in determining whether the rule of reason will save a breach of the prohibition on cartel agreements.

Specifically, KPPU will likely consider a breach of a prohibition saved by the rule of reason if that breach:

- caused no decrease in the production or delivery of products, whether goods or services, in the relevant market, nor any increase in those products' prices;
- was not committed to reduce competition in the relevant market, but instead to provide an improved product;
- was committed by a business actor which did not control over 50 per cent of the market;
- caused the market to operate more efficiently; and/or
- was reasonably necessary for the business actor in the circumstances.

Unfortunately, there is no guidance on the weight attached to the individual factors.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may fall within the scope of ICL article 15(3), which prohibits a business actor from entering into an agreement with another business actor concerning the price, or discount on the price, of the good or service, which provides that the business actor receiving the good or service from the supplying business:

- must be willing to buy another good or service from the supplying business actor; or
- will not buy the same good or service, or a good or service of the same type from another business actor that is a competitor of the supplying business actor.

In addition, the practice may also violate ICL articles 19, which prohibits specified forms of market control, and 25, which generally prohibits abuses of a dominant position, if it prevents actual or potential competitors from supplying the same products or prevents consumers from obtaining similar products that are competitive in price or quality.

ICL does not distinguish between retroactive and incremental rebates.

In *Arta Boga Cemerlang (ABC)* (2005), KPPU determined that ABC breached Article 25 by engaging in exclusionary practices towards its competitors and entering into agreements with its wholesalers and grocers, which provided:

- a 2 per cent discount would be given, if they agreed to sell ABC's batteries; and
- an additional 2 per cent discount would be given, if they agreed not to sell ABC's competitor's products.

In *Telkom* (2005), the Supreme Court determined that Telkom breached article 15(3)(b) by providing exclusive rebates to hotels and offices on the condition that these hotels and offices would not use international telecommunications services offered by Indosat, a competitor. With its dominance in the public switched telephone network market, Telkom thereby also abused its dominant position, in contravention of article 25.

ICL permits dominant business actors to employ rebate schemes for certain commercial reasons, such as achieving economies of scale or assisting in product launches. Again, KPPU applies the rule of reason, and will not consider a rebate scheme abusive if it contributes to the business' success by way of efficiency improvements or innovations, as opposed to competitor exclusion.

15 Tying and bundling

ICL article 15(2), as above, prohibits a business actor from entering into an agreement with another business actor that provides that the business actor receiving a good or service must be willing to buy another good or service from the business actor that supplied the original good or service. Article 15(3) prohibits a business actor from entering into an agreement with another business actor concerning the price, or discount on the price, of the good or service, which provides that the business actor receiving the good or service form the supplying business actor will not buy the same good or service or a good or service of the same type from another business actor that is a competitor of the supplying business actor.

16 Exclusive dealing

ICL article 15(1) prohibits a business actor from entering into an agreement with another business actor that provides that the business actor receiving a good or service is required to either supply or not supply that good or service to a specified party or place.

Even though article 15(1) is formulated as a per se prohibition, KPPU adopts a rule of reason upon enforcement, such that a business actor will only be found to have breached the article if their conduct has involved monopolistic practices or resulted in unfair business competition in the relevant market.

In *Semen Gresik* (2008), the Supreme Court determined that Semen Gresik breached Article 15(1) by entering into agreements with distributors that specified the price at which those distributors would sell its product and the identities of those parties it would sell to, and prohibited the distributors from selling other cement brands.

In *Angkasa Pura I* (2014), which concerned ground-handling services for non-scheduled commercial flights at Bali's Ngurah Rai International Airport, Angkasa Pura I allegedly gave Execujet exclusive rights to provide certain services at the Airport's General Aviation Terminal. KPPU fined Execujet 2 billion rupiah and Angkasa Pura I 5 billion rupiah. Angkasa Pura I was also ordered to revoke its exclusive agreement with Execujet. Angkasa Pura I's appeals to the Central Jakarta District Court and the Supreme Court were both denied.

17 Predatory pricing

ICL article 20 prohibits predatory pricing by prohibiting business actors from selling a good or service at a loss or an otherwise very low price, with the intention of eliminating competitors from the relevant market, if this would involve monopolistic practices or result in unfair business competition.

Although KPPU is yet to determine any predatory pricing allegations, it has released Guidelines 6 of 2011 on Predatory Pricing, which suggest that a business actor has engaged in predatory pricing if it has, among other things, set prices that are unreasonably low, such that they are, for example, below cost; however, a business actor will not have engaged in predatory pricing if it is unable to recoup the losses caused by such low prices.

18 Price or margin squeezes

Price or margin squeezes may be prohibited by ICL article 14, which is concerned with vertical integration. A business actor may not enter into an agreement with another business actor with the purpose of controlling the production of a number of products that are included in a chain of production of certain goods or services, where 'each link in that chain is the end product of the production process or of the further processing'. The links in the purported production chain may 'relate directly or indirectly to each other'. The prohibition only applies where the relevant agreement involves monopolistic practices or results in unfair business competition in the relevant market.

19 Refusals to deal and denied access to essential facilities

ICL article 10 prohibits refusals to deal or boycotts, by prohibiting a business actor from entering into an agreement with a competing business actor that:

- could prevent other business actors from engaging in the same business activity, either in a relevant domestic or international market; or
- provides that the competing business actor will not sell a specified good or service of any other business actor, if such an agreement would:
  - result, or potentially result, in a loss to that other business actor; or
  - limit the other business actor's ability to sell the specified good or service in the relevant market.

ICL also recognises a unilateral refusal to deal with a competitor as an abuse of dominance, subject to the rule of reason.

KPPU treats both the agreements and the threat of such agreements as breaching the prohibitions, as the latter may still induce actions by consumers or suppliers that are harmful to competition.

20 Predatory product design or a failure to disclose new technology

ICL does not address predatory product design or failures to disclose new technology.

21 Price discrimination

ICL article 19(d) prohibits price discrimination by providing that a business actor is prohibited from entering into an agreement that results in a purchaser being required to pay a price for a good or service that is different to the price paid by another purchaser.

The rule of reason prevails, such that, in practice, KPPU will not pursue a business actor for price discrimination where the setting of a different price for different purchasers:

- does not involve monopolistic practices or results in unfair business competition in the relevant market; or
- is otherwise reasonable in circumstances, for example, if based on a difference in quantities ordered or payment terms.

KPPU will pursue a business actor if, however, the discrimination is premised on non-economic bases including, for example, the purchaser's ethnicity, race or social status.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply may violate ICL articles 17, which prohibits abuses of monopoly power, and 25, which generally prohibits abuses of a dominant position.

In *Temasek* (2008), the Supreme Court determined that Telkomsel, the largest GSM provider in Indonesia, had breached ICL article 17. Telkomsel's tariffs were determined to be exploitative of consumers. Specifically, it was determined that Telkomsel's pricing strategy caused other GSM providers to increase their tariffs, leading to higher tariffs overall in the mobile phone industry. After comparing the costs of production, prices of the same products and profitability rates in neighbouring countries, the Court concluded that Telkomsel's tariffs were excessive.

23 Abuse of administrative or government process

ICL does not specifically address abuses of administrative or government process.

24 Mergers and acquisitions as exclusionary practices

ICL article 28 and Government Regulation 57 of 2010 on Mergers and Acquisitions (GR 57/2010) prohibit business actors from conducting mergers and acquisitions where this would involve monopolistic practices or result in unfair business competition in the relevant market. If a merger or acquisition breaches article 28 or GR 57/2010, KPPU may terminate the agreement.

KPPU recommends that where business actors perceive a risk of falling afoul of ICL article 28 or GR 57/2010, they may consult with KPPU prior to closing. Notification after transaction close is only mandatory if:

- there is a change of control in the target company;
- the combined assets of the parties exceed 2.5 trillion rupiah (or 20 trillion rupiah if both parties are banks); or
- the combined annual sales of the parties exceed 5 trillion rupiah.

25 Other abuses

There are no other types of abuses prohibited by the ICL.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

KPPU, the District Courts, the Supreme Court, the police and the Public Prosecutor's Office are charged with enforcing the ICL. Of these, KPPU plays the most important role. The police assist with investigations and the Public Prosecutor's Office becomes involved when there is the (rare) prospect of criminal charges. The District Courts and Supreme Court handle appeals against KPPU determinations.

KPPU is comprised of Boards of Commissioners and a Secretariat. The Commissioners determine matters, after conducting hearings, while the Secretariat investigates and prosecutes. KPPU Regulation 1 of 2010 on Case Handling Procedures established an adversarial system between the accused business actor and KPPU's Secretariat. KPPU will erect a 'Chinese wall' between the Commissioners and the Secretariat and between units of the Secretariat, as necessary.

KPPU may:

- commence an investigation after receiving a report or complaint, or on its own initiative; and
- summons business actors, individuals (including government officials) or experts as witnesses. Should a party resist a summons, KPPU may request police assistance.

KPPU may initiate criminal proceedings if:

- a party does not cooperate with its investigation by, for example, not attending a hearing despite being summonsed or refusing to provide documents despite being subpoenaed; and
- a business actor fails to comply with a final and binding KPPU determination after it has exhausted all available legal challenges.

KPPU has no power to conduct criminal investigations or impose criminal sanctions. Such authority rests with the police, the Public Prosecutor's Office and the Courts.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

ICL provides for three categories of sanctions: administrative, basic criminal and additional criminal.

Administrative sanctions

KPPU is authorised by ICL article 47 to impose on business actors that have violated ICL, administrative sanctions, including:

- an annulment of a range of prohibited agreements;
- an order to cease prohibited forms of vertical integration;
- an order to cease activities proven to have involved monopolistic practices or resulted in unfair business competition in the relevant market, or other harm;
- an order to cease abuse of a dominant position;
- an order preventing a prohibited contemplated merger or consolidation of business actors, or acquisition of shares;
- an order for the payment of compensation; and
- a fine of between 1 billion rupiah and 25 billion rupiah.

All sanctions are final. There is no provision for interim measures.

Administrative sanctions are imposed in accordance with the KPPU Guidelines, which are helpful in determining compensation payable by, and fines imposed by the KPPU on, business actors that have violated ICL.

As for compensation, the Guidelines provide that the amount of compensation payable will be the amount of actual loss or damage suffered by the party claiming such loss or damage, less an amount that appropriately reflects the presence of any mitigating factors, including a business actor's cooperation with the KPPU, unintentional violation

Update and trends

New draft ICL
KPPU submitted a new bill, which would replace ICL, to Parliament in mid-2016. Parliament has not issued any updates on whether it will amend or replace the ICL in the near future. Specifically, the bill would:

- expand the definition of 'business actors', to include those domiciled outside of Indonesia and to those who do not conduct activities in Indonesia whose conduct has a negative impact on the Indonesian market;
- prohibit abuses of a 'dominant bargaining position';
- remove the voluntary pre-merger and acquisition and mandatory post-merger and acquisition notification systems and replace them with a mandatory pre-merger and acquisition notification system, and enlarge the categories of merger and acquisition activities that must be notified to include the acquisition of assets and the establishment of joint ventures;
- impose financial sanctions of between 5 per cent and 30 per cent of a business actor's sales value or an M&A transaction value;
- introduce a leniency programme, which will be especially relevant in cartel cases, under which KPPU could provide immunity or penalty reductions to those who notify KPPU of ICL breaches;
- provide incentives for 'changes of behaviour', such that if a business actor notifies KPPU of an ICL breach and takes action to remedy the breach, this may result in a KPPU investigation not commencing or an ongoing KPPU investigation being terminated;
- no longer exempt intellectual property licensing and franchising agreements; and
- expand KPPU's investigative powers, so that KPPU may conduct searches of premises and compel the attendance of witnesses, experts and parties concerned and the production of documentary evidence provides for 'interim measures' such that during the course of an investigation KPPU could enjoin a business actor from continuing with an alleged ICL breach.

New task force to oversee relationships between small and large business actors
Law 20 of 2008 on Micro, Small and Medium-sized Enterprises (MSME) and Government Regulation 17 of 2013 enabled KPPU to investigate relationships between large business actors and their MSME suppliers, given the significant potential for the abuse of the latter by the former. In late 2016, KPPU implemented KPPU Regulations 1 and 3 of 2015 by forming a task force to oversee these relationships.

This task force may be seen as a precursor to the new bill, insofar as the latter would prohibit abuses of a 'dominant bargaining position' (which are abuses a large business actor may commit with respect to its MSME suppliers).

of ICL, acts of contrition and the likelihood of the business actor going bankrupt.

Basic criminal sanctions
ICL provides that business actors that have violated specified ICL articles will be fined between 1 billion rupiah and 100 billion rupiah, or imprisoned for up to six months.

Additional criminal sanctions
ICL provides that should a basic criminal sanction be imposed, additional criminal sanctions may be imposed in the form of:

- a revocation of the business actor's business licence;
- a prohibition on the business actor being a director or commissioner for between two and five years; and
- an order requiring the cessation of certain activities by the business actor that causes loss to another.

The highest recorded fine is 25 billion rupiah. KPPU frequently imposes similarly severe fines in cases involving serious breaches of article 25 or the other dominance-related articles.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

KPPU is authorised to determine alleged ICL breaches after conducting an investigation and hearings. A business actor may wish to appeal a KPPU determination to the relevant District Court and then the Supreme Court. Only after appeals are exhausted, and KPPU obtains a court order, are KPPU sanctions applied to the business actor.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

KPPU has seen a steady increase in enforcement in the past five years. In 2015 there were 18 determinations and four ongoing investigations, while in 2014 KPPU issued 19 determinations.

It is unclear from public reports what categories of abuse of dominant position receive most attention from KPPU. However, there does seem to be a clear focus on tender-fixing (which is not necessarily a category of abuse of dominant position), with 49 per cent of reports received by KPPU relating to tender-fixing in 2015. It is also the most investigated, with 62 per cent of KPPU investigations relating to tender-fixing in 2015.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Contracts entered into by dominant business actors that abuse a dominant position may remain valid until the business actor has exhausted all available legal challenges and the KPPU determination becomes final and binding. Such determinations can require the termination or amendment of the contract, as detailed above.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

ICL does not provide a mechanism for private enforcement. However, as mentioned below, compensation may be sought in certain circumstances by parties who have incurred loss as a result of the business actor's breaches of the ICL.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

ICL article 38(2) provides that a party that suffers loss because of a violation of ICL may file with KPPU a written report, which contains a complete and clear statement of the alleged violation and the loss. This may then trigger an investigation by KPPU and an award of compensation to the reporting party in the form of an administrative sanction imposed on the business actor that violated ICL. KPPU has yet to award such compensation.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

KPPU determinations may be appealed to the District Court and later, the Supreme Court. The former may review the facts and the law, while the latter may review the application of law only. Parties wishing to appeal a KPPU determination need to submit an appeal to the District Court within 14 business days after receipt of notice of the determination.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

KPPU seeks to apply several of the dominance-related articles to the unilateral conduct of non-dominant firms. For instance, article 19 prohibits business actors, be they dominant firms or otherwise, from engaging in specific activities unilaterally that may lead to monopolistic practices or otherwise unfair business competition such as:

- preventing other business actors from conducting the same business in the relevant market;
- preventing consumers of their competitors' good or service from engaging in a business relationship with such business competitors;
- restricting the distribution or sales of a good or service in the relevant market; or
- engaging in discriminatory practices.

Although article 19 does not explicitly require that the relevant business actor occupy a dominant position, in practice, only those business actors in such a position will ordinarily be positioned to breach such provisions and attract KPPU scrutiny.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Abuse of a dominant position is prohibited by section 5 of the Competition Acts 2002–2014 (the Act) and article 102 of the Treaty on the Functioning of the European Union (the Treaty). Section 5 of the Act mirrors article 102 of the Treaty except that section 5 refers to abuse of a dominant position in trade for any goods or services in the state (ie, Ireland) or in any part of the state.

The Irish national competition authority, the Competition and Consumer Protection Commission (CCPC) (formerly known as the Competition Authority) and the Commission for Communications Regulation (ComReg) (see question 4) can investigate breaches of section 5 and article 102 prohibition. However, only the Irish courts can make a legally binding finding that conduct constitutes an unlawful abuse of a dominant position.

The Act makes abuse of a dominant position (under section 5 or article 102 or both) a criminal offence that can be prosecuted before the Irish courts and is punishable by financial penalties. The Act also includes specific provision for aggrieved persons and the CCPC to take civil proceedings before the Irish courts seeking remedies for an abuse of a dominant position. The remedies available in civil proceedings include a court declaration, damages and an injunction. In particular, section 14(7) of the Act enables an Irish court to take intrusive structural measures to terminate a dominant position that has been abused (as well as to terminate the abuse) by issuing:

> *an order to require the dominant position to be discontinued unless conditions specified in the order are complied with, or require the adjustment of the dominant position, in a manner and within a period specified in the order, by a sale of assets or otherwise as the Court may specify.*

To date, no penalty or structural remedy for abuse of dominance has been granted by the Irish courts and there have been no significant cases where damages were awarded.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

There is no definition of dominance within the Act. The Irish courts and the CCPC have adopted the definition formulated by the Court of Justice of the European Union (CJEU) in case 27/76, *United Brands v Commission* [1978] ECR 207:

> *(a) position of economic strength enjoyed by an undertaking which enables it 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, customers and ultimately of its consumers.*

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The object of the legislation and the underlying standard are strictly economic and do not seek to protect other interests (except for those provisions in the Act dealing with media mergers).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are sector-specific regulations in all key regulated sectors (electronic communications, postal services, energy and aviation). In the electronic communications sector the relevant regulatory body, ComReg, can designate operators as having significant market power in accordance with the 'Framework Directive' (2002/21/EU) on a common regulatory framework for electronic communications networks and services.

In the electronic communications sector, ComReg concurrently holds the same enforcement powers as the CCPC. The Communications Regulation (Amendment) Act 2007 (the 2007 Act) extended ComReg's functions to include competition powers (concurrent with those of the CCPC) in respect of matters arising under, inter alia, section 5 of the Act concerning electronic communications services, networks or associated facilities.

A cooperation agreement is in place between the CCPC and ComReg. Pursuant to the 2007 Act, in instances of disagreement between the CCPC and ComReg as to jurisdiction, the decision as to which body shall act in a given instance falls to the Minister for Communications, whose decision is final. To date, in practice, ComReg tends to lead the investigation of competition law issues that affect the markets where it has jurisdiction.

Other sectoral regulators supervise operators in their respective sectors in accordance with the relevant sector-specific legislation. This legislation may enable the regulator to make ex ante rules designed to alleviate the effects of dominance. In addition to its cooperation agreement with ComReg, cooperation agreements are in place between the CCPC and eight other sectoral regulators with a view to avoiding duplication and ensuring consistency in their enforcement actions.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The prohibition on abuse of dominance applies to 'undertakings'. An undertaking is defined as 'a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service'.

Public bodies that carry on an economic activity, such that they satisfy the definition of an undertaking, are subject to the Act. In 2012 and 2013 the High Court considered allegations of abuse of dominance brought against public authorities responsible for charging for the use of harbour facilities and in both cases it was decided that the defendant was acting as an undertaking subject to competition law (*Island*

Ferries Teoranta v Minister for Communications, Marine and Natural Resources [2011] IEHC 388 and *Island Ferries Teoranta v Galway County Council* [2013] IEHC 587). Further, in *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others* [2009] IEHC 588, the High Court found that the fact that the local authorities in the greater Dublin area were responsible for the regulation of waste collection services within their respective areas did not preclude them from being 'undertakings' when the local authorities themselves provided waste collection services. In October 2008 the Competition Authority determined that the Health Service Executive is not an undertaking when it engages in either negotiating with pharmaceutical representatives in respect of the ex-factory price of certain drugs or purchasing community pharmacy services from private sector pharmacy undertakings (Enforcement Decision (ED/01/008)).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Section 5 of the Act and article 102 apply only to dominant firms.

7 Collective dominance

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

Yes. Section 5(1) of the Act and article 102 provide that any abuse by 'one or more undertakings' of a dominant position is prohibited. In *A&N Pharmacy v United Drug* [1996] 2 ILRM 42, the High Court recognised that collective dominance may exist in circumstances in which three suppliers controlled 90 per cent of the relevant market.

In *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others*, the High Court found that the local authorities in question were collectively dominant in respect of the provision of waste collection services in the greater Dublin area as well as being dominant individually within each of their respective geographic areas.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The legislation is applicable to dominant purchasers, as confirmed by the Competition Authority in rejecting an allegation that Aer Lingus had abused its position on the market for the purchase of travel agents' services (Authority Decision No. E/02/001) and by the High Court in *Blemings v David Patton* [2001] 1 IR 385.

Section 5(2)(a) of the Act provides that an abuse of a dominant position may involve 'directly or indirectly imposing unfair purchase or selling prices', which confirms that the Act applies to dominant purchasers. Enforcement practice and case law has not provided for any distinction in the application of the law to dominant suppliers as regards dominant purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

There is no test for market definition within the Act. However, the High Court has referred to the test set out in the European Commission's notice on the definition of the relevant product market for purposes of Community law ([1997] OJ L372/5) (the Notice), which states:

> *A relevant product market comprises all those products and / or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.*

The Irish courts and the CCPC generally follow the Notice's definition of the relevant geographic market, which states:

> *The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.*

The CCPC's practice on market definition is set out in its guidance in the merger control rules and its 'Enforcement Decisions'. In *Competition Authority v O'Regan & Others,* [2004] IEHC 330 the question of the correct market definition was of key importance in the Supreme Court's overruling of a High Court's decision. In October 2004, the Competition Authority obtained a High Court ruling that the Irish League of Credit Unions (ILCU) had abused its dominant position in the market for credit union representation by refusing to supply savings protection insurance to credit unions that were not members of ILCU. The High Court ordered ILCU to share access to its savings protection scheme with credit unions not affiliated to it. The Supreme Court subsequently overruled the High Court's decision, finding that savings protection schemes were not, in fact, a commercially saleable product and that the Competition Authority had failed to provide an economic analysis to substantiate its claim that representation services and savings protection schemes were distinct products in distinct product markets ([2007] IESC 22). The Supreme Court concluded that a specific market for savings protection schemes did not exist since such protection schemes were only ever provided, both nationally and internationally, by leagues of credit unions and only to their own members. Accordingly, such schemes did not constitute a relevant product market. The Competition Authority's case that ILCU's conduct amounted to a tying abuse thus failed.

With regard to market share thresholds, the Irish courts and the CCPC will follow the case law of the CJEU in respect of this issue.

In *Meridian Communications and Cellular Three v Eircell* [2002] 1 IR 17, the High Court held that despite Eircell's relatively high market share (around 60 per cent), the plaintiffs had failed to prove that Eircell was dominant. The High Court held that reliance on the structural aspects of the market was not justified in the circumstances of the particular market in question and that the significance of Eircell's large market share was greatly diminished in light of its dramatic decline (from 100 per cent) over a relatively short period of time. Likewise, in *Blemings v David Patton* the High Court held that a monopsonist would not be dominant in the absence of barriers to entry and exit in the market.

In its 'Enforcement Decision' on RTÉ, while the Competition Authority did not reach any final findings on the point, it indicated that its preliminary view was that RTÉ was likely to hold a dominant position in the market for television advertising airtime in the state, despite the fact that its market share by revenue (55 per cent to 65 per cent) had been in decline and that new players had entered the relevant market.

In *TicketMaster Ireland* (Authority Decision No. E/06/001) the Competition Authority took the view that, although TicketMaster Ireland held 100 per cent of the Irish market for outsourced ticketing services for events of national or international appeal, no dominant position existed owing to the constraint placed on TicketMaster Ireland by large-event promoters.

In the decision of the Electronic Communications Appeal Panel in the appeal by Three Ireland (Hutchison 3G Ireland) of a designation of significant market power (SMP), reliance was placed on the European Commission's SMP guidelines, which stressed that the existence of a dominant position cannot be established on the sole basis of large market shares and that a thorough overall analysis should be made of the economic characteristics of the relevant market before coming to a conclusion. In that case, despite the appellant's 100 per cent share of the market for voice call termination on its own network, the panel found that there was a failure to properly carry out the analysis required including delay, market saturation, new entrants issues, alternative buyers, the role of competition and presence of countervailing power; therefore, the SMP designation was overturned.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 5(2) of the Act or article 102 of the Treaty set out the examples of abuse of dominance. Such abuses may consist of:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In enforcing the section 5 prohibition the CCPC tends to follow an effects-based approach. A good example of such an approach is the Competition Authority's decision in *TicketMaster Ireland* (referred to in question 9). Writing in a personal capacity, the member of the Competition Authority responsible for that decision subsequently noted that 'the form-based approach strongly supported the allegations of high prices based on exclusive contracts, while the effects-based analysis found, correctly, that countervailing buyer power, efficiencies and other factors meant that TicketMaster Ireland was neither dominant nor that its conduct was anticompetitive' (Dr Paul Gorecki, *Journal of Competition Law and Economics* 2006 2(3): 533-548).

Whereas formally there are no per se prohibitions of specific conduct under section 5 of the Act or article 102 of the Treaty, the CCPC is influenced by the approach of the European courts and the European Commission. Accordingly, there are certain forms of conduct on the part of dominant undertakings that will be presumed to be abusive (although the company always retains the possibility to justify its conduct, see question 13). For example, in its decision in *Drogheda Independent* (Decision No. E/05/002), the Competition Authority noted that its approach towards the identification of unlawful predatory pricing was based on that of the CJEU in case C-62/86 *Akzo v Commission,* whereby prices below a dominant undertaking's average variable costs are presumed to be predatory. Likewise, in its 'Enforcement Decisions' regarding allegedly unlawful 'loyalty rebates' offered by RTE and An Post respectively (see question 29), the Competition Authority noted that its approach towards the identification of unlawful 'loyalty rebates' was based on decisions of the CJEU in joined Cases C-241/91 P and C-242/91 *RTÉ and ITP v Commission* and Case 5/69 *Volk v Vervaecke*.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes, both are covered.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Dominance and abuse can take place in the same market or in neighbouring markets. *Donovan and others v Electricity Supply Board* [1997] 3 IR 573 involved a finding of an abuse of ESB's dominant position on the market for the supply of electricity by restricting competition on the market for the supply of electrical contracting services to low-voltage installations, on which its presence was minimal.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

General defences to allegations of abuse of dominance developed under EU law may be raised (eg, the concepts of objective justification and proportionality). Section 7(2) of the Act provides that it shall be a good defence to a criminal prosecution for an alleged abuse of a dominant position to provide that the 'act or acts conceived was or were done pursuant to a determination made or a direction given by a statutory body' (eg, a sectoral regulator). The issue of whether allegedly abusive conduct is imputable to a regulator or a regulated entity was considered in the recent case of S*hannon LNG Limited v Commission for Energy Regulation & Others* (see questions 22 and 29).

It is likely that the CCPC and the Irish courts will take account of the European Commission's guidance on its enforcement priorities in applying article 102 of the Treaty ([2009] OJ C 45/1), paragraph 28 of which provides that a dominant undertaking may justify its conduct on the basis that the conduct in question produces substantial efficiencies that outweigh any anticompetitive effects on consumers.

The CCPC considered the possibility of an efficiency defence or another objective justification for allegedly unlawful rebates in its investigations of RTE and An Post (see question 29) but took the preliminary view that there was insufficient evidence that the claimed efficiency gains outweighed the likely harm on competition.

Specific forms of abuse

14 Rebate schemes

There is no specific reference to unlawful rebate schemes in the Act but these can amount to abuse in breach of section 5 of the Act and article 102. The CCPC and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that rebate schemes can be unlawful.

The CJEU found in *Irish Sugar* [2001] ECR I-5333 that the system of rebates operated by Irish Sugar plc on Irish sugar markets breached article 102 of the Treaty.

To date, there are no decided Irish court cases that have dealt with this form of abuse.

The 'Enforcement Decision' on the Competition Authority's investigations of RTÉ (see question 29) was the first written account of its views on the complex issues surrounding the competition law compliance of rebate schemes offered by dominant undertakings. This decision was followed a year later by another 'Enforcement Decision' in relation to discounts offered by An Post.

The approach taken by the Competition Authority in explaining the nature of its concerns regarding these discounts schemes followed closely the case law of the CJEU and the structure of European Commission guidance on its enforcement priorities in relation to cases involving article 102.

15 Tying and bundling

Section 5(1)(d) of the Act provides that abuse may, in particular, consist in, 'making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts'.

In the *ILCU* case, discussed in question 9, the High Court held that ILCU's tying of access to its savings protection scheme to membership of ILCU involved the abuse of its dominant position, but this judgment was overturned on appeal to the Supreme Court.

In the case of *Blemings v David Patton*, the High Court held that a tie-in, whereby chicken farmers were obliged to purchase meal through the chicken processor rather than directly from the suppliers of meal, was not abusive as it was objectively necessary in order to ensure quality control and traceability of the product.

16 Exclusive dealing

There is no specific reference to such conduct in the Act, but it can amount to an abuse of dominance in breach of section 5 of the Act.

This type of conduct was examined in the *Masterfoods v HB* case [1993] ILRM 145, where the High Court considered that the provision of ice cream freezers to retailers for the exclusive storage of a dominant supplier's product did not amount to an abuse by the supplier of its dominant position, even though it recognised that this strategy made it more difficult for new entrants to become established in the market. However, in a related case, T-65/98, *Van den Bergh Foods v Commission* [2003] ECR-II – 4653, the General Court held that the exclusivity clause had the effect of preventing retailers from selling other brands of ice cream and preventing competitors from gaining access to the market, and, therefore, involved the abuse by the supplier of its dominant position (this position was subsequently confirmed by the CJEU).

17 Predatory pricing

Section 5(1)(a) of the Act refers to 'unfair' prices but there is no specific reference to predatory pricing in the Act. Nonetheless, predatory pricing can amount to abuse in breach of section 5 of the Act and the CCPC, and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that predatory pricing can be unlawful.

In *Drogheda Independent* (referred to in question 10) the Competition Authority considered an allegation of predatory pricing in the market for advertising in local newspapers. Although it took the view that the undertaking in question was not dominant, its approach to predation is noteworthy. First, it stated that:

> *predatory pricing refers to a situation whereby a dominant undertaking strategically reacts to the entry or presence of a competitor by pricing so low that it deliberately incurs losses so as to expel the competition from the market in order to charge below the competitive level in the future.*

Second, it stated that in investigating predatory pricing allegations it follows 'a structured rule of reason approach' in order to assess whether the alleged predation was plausible, there was any alternative business justification for the conduct other than predation, recoupment was feasible and pricing was below cost.

18 Price or margin squeezes

Section 5(1)(a) of the Act refers to 'unfair' prices but there is no specific reference to price or margin squeeze in the Act. Nonetheless, such conduct can amount to abuse in breach of section 5 of the Act and the CCPC and the Irish courts would be expected to follow the case law of the CJEU and the practice of the European Commission in holding that price squeeze can be unlawful.

In 2014, ComReg conducted an investigation into an alleged abuse of an alleged dominant position by RTÉ and its wholly owned subsidiary RTÉ Transmission Network Limited, following a complaint by a competitor (TV3). The complaint referred to the market for the supply of wholesale analogue terrestrial television transmission and distribution services and it was alleged, among other things (see question 22), that RTÉ's prices were unlawful because they discriminated against and price-squeezed its competitor, TV3. Following a detailed investigation, including economic analysis of the alleged price differentiation, ComReg published a decision explaining that there were insufficient grounds for action in respect of this allegation. In particular, ComReg identified no evidence that RTÉ's prices resulted in a material impediment to competition. ComReg did not reach a firm conclusion on market definition or whether RTÉ was dominant because it was not necessary as there was no evidence of an abuse.

19 Refusals to deal and denied access to essential facilities

There is no specific reference to refusal to deal or provide access to essential facilities in the Act. Nonetheless, these types of behaviour may be considered abusive and unlawful under section 5 of the Act.

In *A&N Pharmacy v United Drug*, the possibility of an unlawful refusal to deal was considered and an injunction was granted that obliged the defendants to continue trading with the plaintiffs pending the full hearing of that case. This case was taken under the predecessor to the Act, which contained a provision similar to section 5.

In the *ILCU* case, discussed in question 9, the Competition Authority suggested that the court consider the practices in question in particular as an unlawful refusal to deal. On appeal, the Supreme Court said that there could be no question of an abusive refusal to supply given its finding that savings protection schemes were not a commercially saleable product.

In December 2005, the Competition Authority published a Guidance Note on Refusal to Supply.

The leading Irish case on essential facilities is *Meridian Communications v Eircell* [2001] IEHC 195. As part of its case, Meridian (a mobile virtual network operator) claimed that the mobile network owned by the licensed operator Eircell constituted an essential facility and that refusal by Eircell to give access to its network was, therefore, an abuse of Eircell's dominant position. However, the High Court took the view that Eircell had no facility that could not be replicated and that, accordingly, no essential facility existed.

20 Predatory product design or a failure to disclose new technology

There are no decided Irish cases that have dealt with this form of abuse under section 5 of the Act. Section 5(1)(b) of the Act provides that abuse can consist of 'limiting production, markets or technical development to the prejudice of consumers', which may possibly be utilised by the CCPC or Irish courts to allege abusive failure to disclose new technology.

21 Price discrimination

Section 5(1)(c) of the Act provides that 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage' is an example of abuse. This provision is wide enough to cover discriminatory pricing or other discriminatory trading terms where there is no objective justification for the different terms offered by the dominant undertaking.

Two recent Irish cases, both brought by the same plaintiff company and discussed in question 5, addressed allegations of discriminatory and unlawful charges by a dominant undertaking.

In *Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources*, the High Court took the view that an order by the Minister that imposed differential harbour charges on ferries with capacity to hold more than 100 passengers would amount to an unlawful abuse of dominance 'in the absence of an objective justification for the amount of the charge and for its differential basis of treatment'. Conversely, it was held in *Island Ferries Teoranta v Galway County Council* that a harbour charge was not discriminatory or abusive as the per passenger charge applied equally in respect of all passengers arriving on all ferries.

22 Exploitative prices or terms of supply

Section 5(1)(a) of the Act states that 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' is an example of abuse.

In *Donovan v ESB* (see questions 12 and 29), the monopoly supplier of electricity was held to have abused its dominant position because it refused, without objective justification, to give members of an association of electrical contractors certain advantages that it had granted to other electrical contractors.

In a more recent Irish court decision on *Shannon LNG Limited v Commission for Energy Regulation & Others* [2013] IEHC 568, the High Court briefly considered and rejected a claim that a tariff regime to be imposed by a regulator would give rise to unfair and unlawful pricing by a dominant market player, in breach of section 5 of the Act. This case related to the proposed imposition of a tariff regime by the defendant energy sector regulator as a result of which the applicant was to be charged tariffs for the use of interconnecting gas infrastructure that it would not benefit from. The applicant alleged that the proposed tariff regime would enable or compel the incumbent gas operator, Bord Gais Éireann (BGE), to 'abuse the dominant position it occupies in the market in the state for the transmission of natural gas'. The High Court considered that the essential question to be asked was 'whether the conduct in question and its effects are attributable to the commercial choice of the operator or to its compliance with a binding direction on the part of the regulator'. The High Court rejected the allegation of abuse of dominance on the basis that the proposed tariff regime would not 'necessarily bring about abusive conduct on the part of BGE'. The High Court also found that the decision as to whether or not the gas interconnectors were integrated with the onshore transmission network was exclusively one taken by the regulator and not a commercial choice attributable to BGE. The cost regime was therefore not attributable to any autonomous commercial choice on the part of BGE, but would be imposed upon it by the sectoir regulator.

In *Island Ferries Teoranta v Minister for Communications, Marine and Natural Resources*, mentioned in questions 5 and 21, the court seemed to hold that the charges imposed on the ferry operator were unlawful for being exploitative (as well as discriminatory). The court took the view that the objective of the increase in charges was not to charge a fee based on the value or cost of the service provided, but to exploit the passenger traffic as a new source of revenue.

In ComReg's 2014 decision on a complaint of abuse of dominance against RTÉ Transmission Network Limited by a competitor (TV3) (see question 18), an allegation of excessive pricing was dismissed following an investigation. This decision was based, in particular, on an economic

assessment of the allegedly unlawful prices against benchmarks based on cost, profitability and the economic and market value of the relevant services.

In *Greenstar (*Authority Decision No. E/05/002), the Competition Authority rejected allegations of excessive pricing in the provision of household waste collection services by Greenstar since its prices were not shown to be excessive in light of either the cost or economic value of the relevant service and compared with prices charged by private operators in other markets. The Competition Authority also expressed concerns about the issue of an appropriate remedy if excessive prices were found and appeared to suggest that, except in exceptional circumstances, it would not bring excessive pricing cases.

23 Abuse of administrative or government process

There is no reference in the Act to abuse of process or abusive litigation, nor are there any court judgments or Competition Authority or CCPC decisions that consider such matters in the context of the abuse of a dominant position. However, such conduct may possibly be considered to be abusive.

24 Mergers and acquisitions as exclusionary practices

A merger or acquisition that has been cleared by the CCPC in accordance with the merger control provisions set out in Part 3 of the Act may not be challenged on the basis of section 5(1) of the Act. A merger or acquisition that is not required to be notified to the CCPC on a mandatory basis (ie, where the financial thresholds for mandatory notification are not satisfied) may also benefit from the immunity from challenge under section 5(1) of the Act if it is notified to the CCPC on a voluntary basis and the CCPC decides to clear it.

If a merger or acquisition is not notified to and cleared by the CCPC, it may be challenged on the basis of section 5(1) of the Act at any time. However, to date, no merger or acquisition has been formally challenged on the basis of section 5 of the Act. However, the CCPC has investigated non-notifiable mergers where it has concerns about a possible breach of section 5 (see, for example, Competition Authority Decision No. E/04/001, *Monaghan Mushrooms,* and the press release on the proposed merger by Easons and Argosy).

25 Other abuses

The examples of abuse contained in section 5 of the Act are indicative and not exhaustive. Conduct that constitutes an abuse contrary to article 102 of the Treaty is also likely to fall within the prohibition contained in section 5 of the Act.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Both section 5 of the Act and article 102 of the Treaty can be enforced by private parties in the Irish courts.

Under the provisions of the Act, any person who is aggrieved in consequence of any abuse that is prohibited under section 5 of the Act or article 102 of the Treaty has a right of action for relief against any undertaking or any director, manager or other officer of an undertaking that commits an abuse. The relief that can be granted to the plaintiff could be in the form of an injunction, a declaration or damages (including exemplary damages).

Under the provisions of the Act, the CCPC has the right to seek an injunction or declaration (but not damages) in respect of a breach of section 5 of the Act or article 102 of the Treaty and the CCPC can apply for a court order making legally binding any settlement terms given to it by a private party following an investigation.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The CCPC has not been conferred with the power to impose sanctions. The courts can grant injunctions or declarations and award damages to private litigants in civil cases.

In addition, both the CCPC and the DPP can initiate criminal prosecutions. However, only the DPP can prosecute serious infringements (prosecutions on indictment for jury trial) of the Act. The maximum penalty that can be imposed for a breach of section 5 of the Act or article 102 of the Treaty is a fine of €5 million or 10 per cent of turnover, whichever is the greater. There is no provision within the Act for imprisonment in cases involving the abuse of a dominant position.

As explained in question 1, structural remedies are also provided for. Under section 14(7) of the Act, where a court has decided that an undertaking has abused a dominant position contrary to section 5 or article 102, it may order either that the dominant position be discontinued unless conditions specified in the order are complied with, or that the dominant position be adjusted (by a sale of assets or as otherwise specified) within a period specified by the court.

To date, the Irish courts have not imposed any penalty or structural remedy for abuse of dominance and there have been no significant cases where damages were awarded.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

As noted above in question 27, the CCPC has not been conferred with the power to impose sanctions due to provisions of the Irish constitution. Only the courts can impose sanctions for breaches of sections 4 and 5 of the Act.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Complaints regarding alleged abuse of dominance are regularly made to the CCPC. The CCPC does not report figures for dominance complaints separately from complaints relating to cartels and anticompetitive agreements. Its most recent annual report (for the period 31 October 2014 to 31 December 2015) states that the CCPC received 74 allegations of competition law breaches during this period.

The public enforcement powers provided for in the Act have rarely been used in respect of abuse of dominance.

Thus far, there has been only one civil prosecution in respect of an alleged breach of section 5 (the *ILCU* case discussed at question 9) and this case was unsuccessful on appeal to the Supreme Court.

Thus far, there has been no criminal prosecution in respect of an alleged breach of section 5.

In recent years, section 5 investigations have most frequently resulted in negotiated settlements and the CCPC and ComReg published details of these investigations on its website in the form of 'Enforcement Decisions' or press releases.

In March 2015, the CCPC published a press release on a settlement concluding its investigation into an alleged abuse of dominance by the Glasnevin Trust, the largest provider of funeral and burial services in Ireland. The settlement terms included requirements to facilitate price transparency and to prevent price discrimination against customers who are also competitors.

In August 2014, the Competition Authority published a press release on a settlement concluding its investigation into an allegedly unlawful refusal to supply by a school uniform manufacturer. The settlement terms included a commitment to supply the complainant whom the manufacturer had originally refused to supply.

In October 2014, the Competition Authority published an 'Enforcement Decision' on its investigation of the compliance of certain discounts offered by the universal postal service provider, An Post, with the section 5 prohibition on unlawful 'loyalty rebates'. The decision identified competition concerns regarding the discounts but stated that its investigation was closed because An Post had amended its discount procedures in a manner that addressed the CCPC's concerns.

The above case involving An Post was the second recent investigation into allegedly unlawful 'loyalty rebates'. In January 2012, the Competition Authority published an 'Enforcement Decision' in respect of its investigation into certain discounts offered by the national public service broadcaster, RTÉ. The decision identified competition concerns regarding the discounts and stated that its investigation was closed because RTÉ made a binding commitment to cease offering 'share deal' discounts that were conditional on a share of the advertiser's television advertising budget being committed to RTÉ.

Update and trends

Section 5 of the Act is based on article 102 of the Treaty and we do not envisage any changes to section 5 or article 102 in the foreseeable future. The CCPC has long advocated for powers to apply administrative fines to breaches of competition law without the need to take civil or criminal proceedings in court. Court actions taken by the CCPC pursuant to alleged breaches of section 5 are rare, and the CCPC generally deals with these issues by way of settlements with the undertakings involved (see question 29). Should the CCPC obtain powers to apply administrative fines for abuses of dominance (which would require legislative change), it is possible that CCPC enforcement of section 5 of the Act or article 102 of the Treaty would increase. However, such legislative change is unlikely in the short term.

Enforcement of alleged breaches of section 5 has been rare in the past number of years, therefore spotting trends in enforcement is difficult at this time. The lack of enforcement may be owing to resourcing or priority issues at the CCPC arising from the difficult economic circumstances prevailing in Ireland since 2008. Section 5 cases are difficult and resource-intensive for the CCPC to run. However, with the Irish economy improving and the CCPC now recruiting more personnel, the CCPC may take more enforcement action in this area in the coming years. We do not expect the CCPC to focus its resources on any particular sector. The types of undertakings that may hold dominant positions often tend to be state-owned ex-monopolists, which tend to attract complaints from aggrieved competitors to the CCPC. It may be the case that these entities are subject to focus from the CCPC in future section 5 enforcement action.

In early 2006 the Competition Authority published details of an investigation of a computerised reservation system (operated by Galileo Ireland) used by most travel agents in Ireland that resulted in a non-discriminatory manner (press release, 11 January 2006).

The courts have been asked to consider in a number of cases whether or not an abuse of a dominant position has occurred. Of the cases considered to date, damages have been found to be payable in only one case involving abuse of dominance (*Donovan and others v Electricity Supply Board*), where it was held that the defendant had abused its dominant position by imposing unfair trading conditions. In *A&N Pharmacy v United Drug*, an injunction was granted that obliged the defendants to continue trading with the plaintiffs pending the full hearing of that case. Both cases were taken under the predecessor to the Act, which contained a provision similar to section 5.

In *Nurendale Limited (T/A Panda Waste Services) v Dublin City Council & Others* the High Court heard a challenge by Panda Waste, a domestic waste collector, to a decision taken by the four local authorities responsible for Dublin City and County to introduce a 'variation' to their joint waste management plan for 2005 to 2010, which would permit each local authority to reserve to itself responsibility for waste collection services in areas in which that local authority had previously competed with private operators (subject to the right of each local authority to put waste collection services in any given area out to tender on an exclusive basis). Panda Waste alleged, inter alia, that this 'variation' amounted to an abuse of a dominant position (held either individually or collectively) by the local authorities since it amounted to an unfair trading condition influencing or seeking to strengthen their position in the market for the collection of waste in the greater Dublin area in which competition had previously existed. In his judgment delivered on 21 December 2009, Mr Justice Liam McKechnie overturned the variation on the basis, inter alia, that each local authority was dominant in its respective area and that the local authorities were collectively dominant in the greater Dublin area in the market for the collection of household waste and that the 'variation' amounted to an abuse of a dominant position (held either individually or collectively) by the local authorities since it was an agreement in breach of section 4 of the Act (which prohibits anticompetitive agreements between undertakings), it would substantially influence the structure of the market to the detriment of competition and it would significantly strengthen the position of the local authorities on the market.

More recently, in *Shannon LNG Ltd and Anor v Commission for Energy Regulation and others* (mentioned at question 22), the High Court heard a judicial review challenge by Shannon LNG, an importer of liquefied natural gas (LNG), to a decision taken by the Commission for Energy Regulation (CER) relating to new methodologies for the calculation of tariffs relating to the use of and access to the transmission system and pipeline network for transport and delivery of natural gas in the Irish state-owned and operated by BGE. Among other claims, Shannon LNG claimed that the decision taken by the CER would enable or compel BGE to abuse the dominant position it occupied in the market in the Irish state for the transmission of natural gas contrary to article 102 TFEU as the contested decision would have the effect of applying charges for access to the onshore transmission system based on both the costs of operating and maintaining that system and the costs of the interconnectors, which the Shannon LNG would not be using. Shannon LNG also claimed a margin squeeze because the tariffs would have the effect of reducing the costs of using the interconnectors while increasing access costs at the other entry points to the transmission system, thereby making it economically more attractive for importers to use the interconnectors. Mr Justice John Cooke rejected Shannon LNG's claims under article 102 TFEU as premature, as the actual tariffs had not yet been set and no entry or exit charges had been calculated. Mr Justice Cooke stated that some level of cross-subsidisation within the transmission system was likely inevitable. The judge also found that the margin squeeze claim was unfounded as it was not possible to identify separate defined markets for the provision of services for transport of gas to Ireland, and a market for transmission services onshore within the state.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

There is no express provision in the Act to deal with this situation. Under the general relief provisions in section 14(5) of the Act, however, a contract could be declared void and unenforceable by a court.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Section 14(1) of the Act provides that any person who is aggrieved in consequence of any abuse that is prohibited under section 5 of the Act or article 102 of the Treaty shall have a right of action for relief against any undertaking or any director, manager or other officer of an undertaking that commits an abuse. It is possible to seek a mandatory injunction under which a dominant undertaking may be obliged to grant access to infrastructure or technology or to trade with the plaintiff seeking the relief. In *ILCU*, discussed in questions 9 and 29 above, ILCU was ordered by the High Court to share access to its savings protection scheme with credit unions not affiliated to ILCU on the basis that access to the scheme was unlawfully tied to membership of ILCU. This order was subsequently overturned by the Supreme Court. Also, in *A&N Pharmacy v United Drug Wholesale*, discussed in questions 7 and 19, the High Court granted an interlocutory injunction that obliged the defendant to supply the plaintiff with pharmaceutical products on terms of cash on delivery.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Section 14(1) of the Act provides that an aggrieved person may bring an action in the courts seeking damages, including exemplary damages. To date, there have been no significant cases where damages were awarded.

In late 2008/early 2009, two private damages actions arising from the European Commission decision in *Irish Sugar* (*Gem Pack Foods v Irish Sugar plc and ASI v Greencore plc*) were settled part-way through their respective hearings before the High Court. Since both cases were settled prior to judgment, the Irish courts have yet to have an opportunity to establish their approach to quantifying damages in such cases.

Directive 2014/104/EU 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 (the Damages Directive) has not yet been transposed into Irish law (despite the deadline for transposition having passed in December 2016), and it remains to be seen what effect the Damages Directive will have on the number of damages claims brought before the Irish courts.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Where the CCPC takes a view that conduct breaches section 5 of the Act or article 102 of the Treaty, it may initiate civil or criminal proceedings before the Irish courts. Civil proceedings are more likely to be initiated for alleged breaches of section 5 or article 102 (eg, the *ILCU* case referred to above in questions 9 and 29). In that case, civil proceedings were initiated in the High Court, whose judgment was appealed to (and overturned by) the Supreme Court. As stated in question 29, section 5 or article 102 investigations most frequently result in negotiated settlements between the CCPC and the relavant undertaking.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

As a result of the Competition (Amendment) Act 2006, the following types of unilateral conduct on the part of both dominant and non-dominant 'grocery goods undertakings' are prohibited (provided that such conduct has the object or effect of restricting, distorting or preventing competition):

- the unilateral application by grocery goods undertakings of dissimilar conditions to equivalent transactions with other grocery goods undertakings;
- any attempt by retailers to compel or coerce the payment of allowances from wholesalers or suppliers in return for advertising particular grocery products in stores; and
- any attempt by retailers to compel or coerce the payment of allowances from wholesalers or suppliers in return for the provision of retail space in newly opened, newly expanded or newly managed stores (a practice referred to in Ireland as 'hello money').

A 'grocery goods undertaking' means any undertaking (other than in the restaurant and catering sector) engaged for gain in the production, supply or distribution of food or drink for human consumption.

In addition to the regime for grocery goods undertakings under the Competition (Amendment) Act 2006, the Consumer Protection Act (Grocery Goods Undertakings) Regulations 2016 (the Regulations) came into effect on 30 April 2016, and apply to contracts entered on or after this date and contracts entered into before 30 April 2016 but renewed after this date. The Regulations impose new obligations on retailers or wholesalers who, either alone or as part of a group, have an annual worldwide turnover in excess of €50 million. The Regulations apply to these parties' arrangements with suppliers for the purchase of 'grocery goods'.

The Regulations impose new obligations on grocery goods undertakings to do the following in particular:

- have a written signed contract in place;
- not vary, terminate or renew a grocery goods contract unless this is expressly provided for and the relevant contract provides for a reasonable notice period;
- provide (on request from a supplier) a forecast of the grocery goods likely to be required in respect of a given future period;
- unless expressly provided for by written contract, pay suppliers within the later of: (i) 30 days of the date of receipt of any invoice; and (ii) the date of delivery; and
- not compel a supplier to pay for stocking; promotions; marketing; retention, increased allocation or positioning; advertising or display; wastage; or shrinkage.

Breach of the Regulations (including failure to comply with any contravention notice issued by the CCPC under the Consumer Protection Act 2007) may result in prosecution of a non-compliant 'grocery goods undertaking', either by summary or indictment with a maximum potential penalty of a fine of up to €100,000. Failure to comply can also result in criminal prosecutions of individuals including the imposition of fines and terms of imprisonment for relevant directors and officers of the companies concerned.

The CCPC also has powers to investigate compliance with the Regulations and to 'name and shame' offenders and statute also provides a legal basis for civil damages actions for breach of the Regulations.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The behaviour of dominant firms is mainly administrated by the Restrictive Trade Practices Law, 5748-1988 (RTPL).

The provisions specified in Chapter IV of the RTPL (ie, the Monopoly Chapter) address, among others, the definition of dominance, the conduct that is perceived as abuse of dominance per se, and the restrictions which can be applied towards dominant entities (RTPL Monopoly Provisions).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The general rule concerning the assertion of dominance is specified within article 26(a) of the RTPL, asserting that any entity (either an individual or a company) that holds a market share of over 50 per cent of the total supply or acquisition of any product or any service (market share standard) shall be deemed as dominant (a monopoly, as defined by the RTPL).

According to article 26(b) an entity may be deemed as a monopoly for a specific region. This will apply where economic factors require viewing such region as a distinctive market.

Article 26(c) enables the Minister of the Economy (Minister), following a recommendation by the General Director of the Restrictive Trade Practices (General Director), to determine with respect to a certain market, that an entity shall be deemed as a monopoly even if it fails to satisfy the market share standard (ie, while holding a market share of 50 per cent or less), if the Minister views such entity having decisive impact on that market. At the time of writing (February 2017), article 26(c) has yet to be enforced.

Article 26 also instructs the General Director to declare the existence of a monopoly in the official state records (monopoly declaration). However, pursuant to several court rulings, this provision only serves for declarative purposes, and therefore, any entity that meets the market share standard shall constitute a monopoly regardless of it being subject to a monopoly declaration (and therefore shall also be subject to all RTPL Monopoly Provisions).

Nevertheless, monopoly declarations do bear significance since they constitute prima facie proof in any legal proceeding, establishing the General Director's relevant market definition and market share determinations. This, among other factors, enables and encourages private enforcement proceedings against monopolies, since it relieves private plaintiffs from the need to prove dominance, thus sparing them undergoing various complex and expensive procedures.

Legislation and case law do not recognise any additional types of dominance such as 'relative dominance', 'heightened market power short of fully fledged dominance', etc.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The main purpose of the RTPL, as specified by various court rulings and decisions published by the Israeli Antitrust Authority (IAA), is to prevent the infliction of harm to competition or the infliction of harm to the public.

Both the courts and the IAA constantly provide a narrow interpretation for the purpose of 'public harm', determining that it shall apply only to such harm which is directly associated with the public interest of preventing harm to competition.

The RTPL Monopoly Provisions serve the same purpose, as they are specifically aimed to prevent monopolies from abusing their dominant position in the market in a way that harms competition (or in a way that harms such public interests which relate to competition).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The RTPL does not contain any sector-specific provisions, and it applies the same market share standard and rules to any monopoly, regardless of the sector in which it operates. As specified in question 2, no Minister has yet used his or her authority to determine that, within a specific sector, an entity shall be deemed as a monopoly even if it fails to satisfy the market share standard.

According to the Law for Promotion of Competition and Reduction of Concentration, 5774-2013 (the Concentration Law), in certain conditions, regulators are not permitted to allocate licences or governmental contracts which concern essential infrastructure to monopolies, or to allow monopolies to participate in the allocation procedures for such rights (mostly tenders), without prior consultation with the Reduction of Economic Concentration Committee (headed by the General Director). The Concentration Law contains a list of essential infrastructure activities to which it applies, which includes, among others, internal communication services, mobile phone services, postal services, broadcasting, petroleum, natural gas, public transportation, fuel and mining.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The RTPL, including the RTPL Monopoly Provisions, applies to any entity (individual or company) which conducts business in Israel. Accordingly, the RTPL shall also apply to any public entity within the framework of their business activity.

Government-owned companies such as the Israel Electric Corporation, the Israeli Airport Authority and various municipal corporations are also therefore subject to the RTPL.

Article 52 of the RTPL allows the Minister, following consultation with the Parliament's Economic Affairs Committee, to exempt an entity from all or some of the provisions of the RTPL (including RTPL Monopoly Provisions), if it believes that such action is necessary for reasons of foreign policy or national security. This provision was employed

by the Israeli government for the first (and only) time in 2016 exempting several natural gas concessionaires from article 30 of the RTPL (which provides the General Director the authority to regulate the activities of monopolies).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The RTPL Monopoly Provisions do not apply to entities that are in the process of becoming a monopoly, nor does it prohibit any entity from becoming a monopoly. This principle relates to the concept held by the RTPL and by the IAA, in which the aim of becoming a monopoly through competition, or being a monopoly per se, is not forbidden.

Nevertheless, one example where the RTPL conveys the principle in which the creation of a monopoly (not through independent expansion) has the potential to harm competition is found within the RTPL's merger provisions (Chapter III). In cases where as a result of a transaction, the market share of the merging parties in a certain market exceeds 50 per cent (ie, the merger results in a formation of a monopoly), that transaction will be subject to a duty to file a pre-merger notification.

7 Collective dominance

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

The issue of collective dominance is covered within Chapter IV1 of the RTPL which administrates the issue of 'concentration groups' (as defined in the RTPL).

According to article 31b of the RTPL, the General Director holds the authority to declare that a limited group of entities jointly possessing a market share of over 50 per cent in a certain market constitute a concentration group, and that every such entity is a member of such concentration group.

Following such declaration, the General Director is authorised to instruct some or all the members of a concentration group regarding steps that they must take in order to prevent the infliction of harm to competition, or in order to increase the level of competition. Such steps include, among others: to instruct that a certain activity of a member of the concentration group shall cease, or to forbid certain information from being transferred or publicised among the members of the concentration group.

However, the RTPL clarifies that the General Director's authorisation to declare the existence of a concentration group is subject to both the following conditions:

- there is limited competition, or there are conditions for limited competition, between the members of the concentration group or within the sector in which the concentration group operates (according to the RTPL, this condition refers, among others, to situations where the relevant sector consists of significant entry barriers); and
- such instructions have the potential to prevent harm (or a risk of significant harm) to the public or to competition or the potential to increase the level of competition.

As of the time of writing, the General Director used this authority only once, declaring that the operating companies of Ashdod and Haifa Ports constitute a concentration group. Within this declaration, the General Director ordered the following steps:

- that the members of the concentration group shall be prohibited from operating a port or providing port services at terminals or platforms where they do not currently operate;
- the members of the concentration group shall not take any action that may obstruct the entrance of another operator into the market, or obstruct such new operator's activity within the market.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

As specified in question 2, the definition of dominance applies to both dominant purchasers and dominant suppliers. Accordingly, the RTPL Monopoly Provisions apply to both types of dominance without distinction, mutatis mutandis.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The relevant product or geographic markets are mainly defined by the small but significant and non-transitory increase in price (SSNIP) test, whereas the IAA also takes into account a few additional significant factors such as entry barriers, product functionality and client perception.

There is no specific or distinct definition of dominance with regard to cases of merger control since the general market share standard (see question 2) applies in any and all sections of the RTPL.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article 29A(a) of the RTPL sets the general rule concerning abuse of dominance, asserting that a monopoly shall not abuse its position in the market in a manner that is likely to reduce business competition.

Article 29A(b) lists the specific conduct deemed as per se abuses of a dominant position:

- establishing an unfair buying or selling price for the product or service in which they are dominant;
- reducing or increasing the supply of goods, or the scope of the services, offered by the monopoly, not within the context of fair competitive activity;
- establishing different contractual conditions for similar transactions in a manner that may grant certain customers or suppliers an unfair advantage as regards their competitors; and
- conditioning a contract regarding the product or service over which their monopoly exists upon terms that, by their nature, or according to accepted trading practices, are unrelated to the subject matter of the contract.

Article 29A is almost identical to article 101 of the EC Treaty. Nevertheless, the interpretation of this article, both by the IAA and the courts, has differed from the interpretation given by EU authorities.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The RTPL covers both exploitative and exclusionary practices. This is also evident within the conducts which the RTPL specifies as abusive per se (see question 10).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The IAA and the courts have not addressed to what extent a link should be shown between dominance and abuse.

In general, the RTPL Monopoly Provisions will only apply in the market in which the monopoly exists. Nevertheless, one exception is the 'tying' offence, which is specified in question 15.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Neither case law nor decisions published by the General Director contain any clear statements as to which 'defence arguments' constitute justifications for abuse of dominance.

In general, the IAA is willing to consider economic efficiency arguments or business justification arguments such as 'free riding'

or 'diseconomies of scale'. However, it has established a very high standard for such arguments, determining that it is not sufficient for a monopoly to exhibit the advantages deriving from its abusive conduct, but it rather must prove that the market will be harmed if the monopoly ceases the challenged conduct (*Ela Recycling Corporation* case).

Specific forms of abuse

14 Rebate schemes

In its most recent monopoly declaration (Port of Ashdod – December 2015), the General Director reconfirmed the prevailing view of the courts and the IAA concerning rebate schemes.

Mostly adopting the EU's approach, the General Director distinguished between two types of rebates: (i) rebates based on individual criteria such as Israeli 'loyalty rebates' (conditioning rebates on the customer's commitment to purchase the entire amount of products he or she requires, or a certain part of such amount, solely from the monopoly) or 'target rebates' (conditioning the rebates on the customer's achievement of subjective targets determined by the monopoly); and (ii) rebates based on objective criteria such as 'quantity rebates' (rebates provided by the monopoly for the entire quantity of purchased goods, based on identical terms shared by all customers).

In general, 'individual-criteria rebates' such as loyalty rebates and target rebates are more likely to be deemed abusive, mainly since, having entered into such agreement with a monopoly, the customer is then prevented from entering any future agreements with the competitors of the monopoly. This limitation shall apply even in such time frames where the competitors can provide equal or better offers (as customers then lose their entire rebate). Here quantity rebates may also be retroactive.

As far as quantity rebates are concerned, they are generally considered legitimate as long as they are based on objective criteria. Nonetheless, the General Director's position is to encourage incremental rebates over retroactive rebates, since the latter, similar to 'individual-criteria rebates', is perceived as reducing the supply of goods open to competition in future time frames.

15 Tying and bundling

The RTPL lists 'tying' as a type of conducts that is treated as abusive per se. As specified in question 10, article 29A(b)(4) defines 'tying' as the conditioning of a contract concerning the product or service over which the firm has a monopoly, upon terms which by their nature or according to accepted trading practices are unrelated to the subject matter of the contract.

As determined by the court (*Yediot Case* (Partial)), in order to assert that 'conditioning unrelated to the subject matter of the contract' actually took place, is must first be shown that the alleged tying product and alleged tied product are indeed distinctive products. The court stated that products are more likely to be deemed distinctive where they sustain: separate demand from the consumer's perspective; separate processes of production, marketing and financing; and and that hold separate supply and demand curves (the demand by customers for product A is not linked or tied to its demand for product B).

Nonetheless, even in cases where the products are determined as distinctive, their 'tying' still may not be deemed as abuse of dominance if the courts are of the opinion that such 'tying' derives from a rooted market practice (ie, a widely common business practice).

With regard to bundling, Israeli law has yet to develop a formal position, and therefore conditions in which the practice shall constitute abuse according to article 29A(b)(4) is quite unclear.

16 Exclusive dealing

The RTPL Monopoly Provisions do not contain any unique provisions concerning exclusive dealing, and the issue is mostly administrated within the RTPL provisions concerning general restrictive arrangements (which apply to all entities conducting business regardless of market power).

It should be noted that several block exemptions, which in certain conditions exempt parties from the requirement of obtaining the approval of the antitrust authorities for restrictive arrangements (including exclusivity clauses), do not apply in cases where one of the parties to the arrangement is a monopoly. This exclusion usually applies whether the monopoly exists in the product market relevant to the restrictive arrangement or in a tangent product market.

17 Predatory pricing

As specified in question 10, article 29A(b)(1) of the RTPL determines that any case where a monopoly establishes an unfair buying or selling price for the product or service in which their monopoly exists, shall be deemed as an abuse of dominance per se. This prohibition includes predatory pricing, a practice in which a monopoly lowers its prices in order to drive weaker competitors from the market, enabling it to then raise prices above competitive levels.

Israeli antitrust law is quite scarce concerning the analysis of predatory pricing, and therefore one cannot point to any clear test constituting an accepted standard. Nevertheless, past statements made by the IAA on this matter indicate that pricing shall be perceived as predatory only when it can be proven both that the price charged by the monopoly in the market for the product is lower than its marginal production cost and that the monopoly had a reasonable prospect of recouping its losses.

18 Price or margin squeezes

In one of its recent determinations (November 2014), the General Director concluded that Bezeq, a monopoly in both the 'Basic Telephone Landline' market and the 'High-Speed Network Access' market, abused its dominant position by practising price or margin squeeze.

According to the determination, the prices charged by Bezeq when providing network services to its competitors in the telephone landline market (an infrastructure which the competitors required in order to operate), were much higher than the prices it charged the general public for both landline and internet services. The General Director stated that this indicates that such price squeeze constitutes abuse of dominance, conducted by Bezeq in order to create substantial entry and expansion barriers for its competitors and to prevent them from competing.

19 Refusals to deal and denied access to essential facilities

Article 29 of the RTPL forbids monopolies 'from unreasonably refusing to supply or purchase the product or service in which their monopoly exists'. This prohibition applies regardless to the nature of the products for which the refusal was made, including non-essential products such as sheer tights for women (*Gibor Sabrina* case).

Nonetheless, in cases where a refusal by a monopoly concerns essential facilities, the 'essential facility doctrine' may be taken into account, therefore increasing the scope in which the monopoly's refusal shall be perceived unreasonable (*Egged Natzba* case).

20 Predatory product design or a failure to disclose new technology

There is no specific legislation or case law that refers to predatory product design or disclosure of new technology. Accordingly, these matters are expected to be examined under the general abuse of dominance rule (article 29A(a)), testing each case according to its individual effect on competition.

21 Price discrimination

The RTPL lists 'price discrimination' as abusive conduct per se. Article 29A(b)(3) prohibits monopolies from establishing different contractual conditions for similar transactions in a manner that may grant certain customers or suppliers an unfair advantage as regards their competitors.

Nevertheless, determining that a monopoly is engaged in price discrimination is not trivial since one has to show that the 'discriminating' contractual conditions were indeed provided to similar transactions. As determined by the courts, in any case where one can trace objective criteria distinguishing the transactions (such as the volume or the composition of the purchased products), the transactions shall not be considered similar and the monopoly shall not be deemed as engaging in price discrimination (*Ofir Investments* case).

Unlike US antitrust law (eg, the US Robinson-Patman Act), the RTPL does not contain any discrimination provisions that apply outside the context of dominance.

22 Exploitative prices or terms of supply

Currently there is much uncertainty regarding the status of the 'exploitative prices' doctrine among the Israeli antitrust community.

In April 2014, the General Director published Opinion 1/14, which administrated the prohibition of excessive pricing by a monopoly (Opinion). The Opinion clarified for the first time that the IAA has adopted the EU's approach (rather than the prevailing US approach) in which the prohibition of unfair pricing by a monopoly is not limited to 'predatory pricing' but also includes excessive pricing.

The Opinion also introduced the methods in which the IAA shall examine whether the price charged by the monopoly is excessive, mainly focusing on a 'cost test' which compares the price paid by the consumer the product's production price. In order to reduce the uncertainty in the market, the Opinion provided a 'safe harbour' mechanism, in which the IAA obligated not to take enforcement measures against monopolies in cases where the gap between the price paid by the consumer the product's production price does not exceed 20 per cent.

However, in April 2016 the IAA published a draft opinion in which it expressed its desire to re-evaluate the Opinion subjecting it to a renewed public hearing (re-evaluation document).

In addition to the practical difficulties faced by the IAA when attempting to identify excessive pricing, the re-evaluation document also specified several fundamental policy flaws embodied in the Opinion, mainly focusing on the inefficiency of the 'safe harbour' mechanism. Among others, it argued that in many cases, the market's need for certainty has transformed the 'safe harbour' into a binding norm, thus harming the monopoly's incentives to reduce production costs and invest in innovation.

The General Director's final opinion on this matter is due to be published during 2017.

23 Abuse of administrative or government process

The RTPL does not include any specific reference to the issue of abuse of administrative or government processes. Although in theory such conduct by a monopoly may amount an abuse of dominant position that harms competition (according to the general rule specified in article 29A(a)), neither the courts or the IAA have yet to publish decisions on this matter.

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are not considered as exclusionary practices by the RTPL.

Nevertheless, it is to be noted that cases where: a monopoly is a party to a merger or the market share of merging parties concentrates over the market share standard (resulting in the formation of a new monopoly), each constitutes a threshold which requires the merging parties to file a pre-merger notification.

25 Other abuses

The RTPL explicitly states that the conducts specified as abuses of dominance per se (see question 10) shall not constitute an exhaustive list.

Accordingly, all other conducts by a monopoly shall be tested through the 'general rule' determined in article 29A(a) of the RTPL, which examines whether a monopoly's conduct abused its position in the market in a manner which was likely to reduce business competition.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The main authority responsible for the enforcement of the dominance rules in Israel is the IAA, an independent government agency headed by the General Director. Appeals against the General Director's administrative decisions are heard by the Antitrust Tribunal, an administrative court specialising in civil antitrust issues (Antitrust Tribunal).

Article 46(b) of the RTPL authorises the General Director, or any IAA representative authorised for this matter, to demand from any entity to provide any information which in the opinion of the General Director would ensure or facilitate the implementation of the RTPL (demand for information). Non-compliance with demands for information may amount to a criminal offence, or alternatively lead to administrative proceedings resulting in monitory penalties.

Update and trends

In May 2016, the General Director declared it was initiating a reform in the IAA's enforcement policy of the RTPL Monopoly Provisions. According to the General Director, the IAA is expected to significantly increase criminal and administrative enforcement against cases of abuse of dominance, and at the same time, devote fewer resources towards Monopoly Declarations (see question 2).

The RTPL also provides the General Director with search and seizure powers (mainly in regard to business premises and to documents or materials seized in business premises), exercised in any case where it believes it necessary in order to ensure the implementation of the RTPL. The General Director is also authorised to investigate any individual connected to a violation of the RTPL.

Any infringement of the RTPL Monopoly Provisions which amount to criminal procedures shall be heard by the District Court in Jerusalem which holds exclusive jurisdiction on such matters.

Private enforcement procedures which involve infringements of the RTPL, including class actions and tort claims, can be brought before any authorised court.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

A monopoly (either an individual or a company) that abuses its dominant position in the market may be subject to criminal liability provided that the abuse was performed with intention to reduce competition. Such infringement is punishable by up to three years imprisonment (five years in aggravating circumstances), and an additional fine of up to 2.26 million shekels in the case of individuals or 4.52 million shekels in the case of companies.

Monopolies abusing their position under article 29A or unreasonably refusing to deal under article 29, or both, are also subject to monetary penalties directly imposed by the General Director. Such penalties, imposed following administrative proceedings (which include hearings), may amount to 1 million shekels in the case of individuals, and up to 8 per cent of the company's yearly revenues (with a maximum penalty of approximately 24.5 million shekels) in the case of companies.

In the *Port of Ashdod* case, the General Director, after determining that the Port of Ashdod abused its monopoly position in the 'unloading of vehicles' market, imposed financial sanctions in the amount of 9 million shekels on the port itself, and personal sanctions (for the first time) in the amount of 20,000 shekels on senior port executives (CEO and Customer VP).

Article 30 of the RTPL authorises the General Director, any time it believes that competition is being harmed as a result of the existence or behaviour of a monopoly or both, to provide such monopoly with the measures it must take to prevent such harm. Article 31 of the RTPL authorises the Antitrust Tribunal, following an application from the General Director, to instruct the monopoly to sell a product in his or her possession, whether all or part of it, if it has found that this may prevent harm to competition.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The General Director is authorised to impose monetary penalties directly without petitioning the courts. Such penalties shall only be imposed following an administrative proceeding which includes an official hearing.

One exception to this concerns the authority to instruct a monopoly to sell a product in its possession, which, as specified in question 27, resides solely with the Antitrust Tribunal.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The IAA and the courts publish only a handful of dominance decisions each year. This derives both from the lengthy investigatory or

examination processes (which extend for an average period of one year), and from the IAA's policy, which enables, in certain cases, enforcement procedures to be terminated through unpublished compromises.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Israeli contract law determines that a contract whose execution, content or purpose is illegal shall be considered void. Nevertheless, Israeli law does not prohibit severability clauses which maintain the validity (and enforceability) of any of the remaining provisions (not tainted by the illegality).

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Any infringement of the RTPL, including the RTPL Monopoly Provisions, has the legal standing of a tort. This enables any damaged party to sue monopolies under the Tort Ordinance, or alternatively, to file a class action under the Class Action Law.

Both Monopoly Declarations (as specified in question 2) or the General Director's determinations to whether a monopoly has abused its position in the market (according to article 29A), constitute prima facie proof in any legal proceeding. Naturally, this constitutes a factor which significantly encourages private enforcement as it spares private plaintiffs from the need to conduct various complex and expensive court procedures.

As of today, private enforcement procedures have become more common following several determinations made by the General Director that several monopolies abused their position by practising excessive pricing. Following these declarations, class actions were filed against Tamar (a monopoly in the natural gas market) and Tnuva (a monopoly in the dairy product market) on the grounds of excessive pricing.

There is no specific legislation which prohibits courts from awarding access to infrastructure or technology held by monopolies or from forcing monopolies to supply products and services. These types of judgments shall be subject to the courts' general policy regarding the terms on which affirmative injunctions are provided.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Any entity, individual or company that suffered damages as a result of an infringement of the RTPL is entitled to initiate private enforcement proceeding against the infringing party. Civil proceedings due to violations of the law, including class actions and tort claims can be brought before any authorised court.

Private enforcement cases which concern abuse of dominance are still quite rare and do not contain any specific doctrine regarding the calculation of damages. In general, as in most civil cases, damages are likely to be based on the actual damages sustained by the plaintiff.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Appeals against the General Director's decisions, among others, Monopoly Declarations, determinations of whether a Monopoly abused its position or monetary penalties, or both, are all heard by the Antitrust Tribunal. Appeals against the Antirust Tribunal decisions are heard by the Supreme Court.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Not relevant for Israel.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The control of the abuse of dominance is regulated in Italy by article 3 of the Law No. 287/1990 (hereinafter the Law). Specifically, article 3 of the Law basically is consistent with article 102 of the Treaty on the Functioning of the European Union (TFEU), providing a prohibition of any abusive conduct carried out by an undertaking holding a dominant position within the domestic market or in a substantial part of it.

Procedural and enforcement rules provided by Presidential Decree No. 217/1998 are applicable in the abuse of dominance proceedings.

Finally, in addition to the provisions contained in the Law, article 2597 of the Italian Civil Code applies to legal monopolies and imposes an obligation to conclude contracts with third parties upon their request and under non-discriminatory conditions.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The Italian Antitrust Authority (IAA) relies on the traditional notion of dominance applied at European level and therefore acts in accordance with the European Law and case law.

A dominant position can be seen as a position of economic strength enjoyed by a company; such position enables said company to prevent an effective competition on the relevant market, since it gives the company the power to behave independently with respect to its competitors, customers and ultimately, the end consumers.

In order to evaluate the dominant position of a company, the IAA usually carries out a comprehensive analysis of different elements, such as market shares, structure of the market, existence of barriers to entry, characteristics of the product, level of production and countervailing buyer power of customers.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

According to article 41 paragraph 1 of the Italian Constitution, 'private-sector economic initiative is freely exercised'. Constitutionally, the valorisation of private initiative meets limits stated in paragraph 2 and 3 of the same article: 'It cannot be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and coordinated for social purposes.' A deep tension exists between the private initiative and the public power, which could exercise a strong control over it in the name of public interest. Effectively, the first interpretation given to the analysed provision exalted the public intervention in the national economy in order to control and plan it, preventing the growth of market power. The process of European integration and social changes modified the perception of this provision, giving adequate importance to the freedom of market competition and its safeguard. In these terms, the text of article 41 seems compatible with the new 'economic constitution', where market and competition deserve the same protection as other general interests. The Italian rules on competition law were approved in this context.

Thus, Italian antitrust law is certainly primarily aimed at maintaining efficiency of the market, striking a balance between private economic initiative and market protection. However, it has to be noticed that in recent years, the IAA increased its focus on consumer welfare, interpreting it very broadly, and this has sometimes led it to mixed consumer welfare and consumer protection goals. Specifically, in its enforcement, the IAA interpreted antitrust law by taking account of different factors. In sectors that are characterised by a rigid and complex regulatory and operating mechanism, the IAA considers also different interests not directly related to efficiency and consumer welfare; in this context, it is relevant to recall the interventions in the pharmaceutical sector, in which the IAA also took into account, inter alia, public expenditure and public health protection.

The recent decision of the IAA, in the *Aspen* case (A480 – *Incremento prezzo farmaci Aspen*), confirmed said trend and demonstrates the commitment of the IAA to identify and challenge potential abuses by pharmaceutical companies of the regulatory procedures, by taking into account the need to contain public expenditure and protect patients.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

In Italy, article 102 TFEU or article 3 of the Law are applicable to any sector or industry.

It is important to mention that the independent regulatory agency for telecommunications (AGCOM) has the power to monitor, investigate and control dominance in the telecommunications sector in order to protect pluralism. In this context, the AGCOM does not impose fines for the abuse of dominance, but can impose regulatory measures in order to ensure the correct functioning of the telecommunications sector.

Similarly, the regulatory Authority for Electricity, Gas and Water (AEEGSI) ensures that the access to essential infrastructures is permitted under transparent and non-discriminatory conditions. If the regulatory measures are infringed, the AEEGSI can issue individual measures. Also in this case, its regulatory powers are not intended to impose sanctions for the abuse of dominance, but rather to ensure the correct functioning of the energy sector, while the IAA remains the competent authority to apply article 3 of the Law and article 102 of the TFEU in Italy.

The IAA often engages in agreements with other sector agencies, or authorities; in this respect, the IAA recently signed a memorandum of understanding with the Italian Medicines Agency (AIFA) in order to increase enforcement in the pharmaceutical sector by strengthening respective investigation powers and facilitating the exchange of data. Under the agreement, the IAA and AIFA will inform each other on cases concerning alleged violations of rules enforced by one of them.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Dominance rules apply to both private and public undertakings, including those in which the state is the majority shareholder.

The only exemption regards undertakings that, by law, are entrusted with the operation of services of general economic interest, or operate on the market in a monopolistic situation, only so far as this is indispensable to performing the specific tasks assigned to them (see article 8 paragrah 1 e 2 of the Law).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Dominance rules apply to companies that already hold a dominant position. The situation in which a company is attempting to become dominant is covered by merger control rules and has no relevance with reference to the abuse of dominance rules.

7 Collective dominance

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

Collective dominance is covered by article 3 of the Law since it prohibits the abuse of a dominant position by one or more undertakings. It is worth considering that in 2005 the IAA opened an abuse of dominance case (A357 – *Tele2/Tim-Vodafone-Wind*) to ascertain whether certain telecommunication undertakings were collectively dominant in the wholesale market for services for accessing the mobile network and, if so, whether they had abused such joint dominance or not. In its final decision, the IAA closed the proceedings without being able to prove that a collective dominance existed.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Even if dominance on the supply side is more common than dominance on the purchase side, Italian antitrust rules also cover the situation in which the dominant undertaking is the purchaser. There are no differences in the application of the law. In the case of a dominant purchaser, dominance has to be evaluated in relation to the possibility of suppliers switching to other customers. Economists and legal scholars consider the market in which only few players operate as an oligopsony and where only one player operates, as a monopsony.

As one example, this situation exists in the pharmaceutical sector. Though in most economic sectors the demand is constituted by those who are purchasing and support the costs, for prescription drugs the expenses are supported by the National Health System, that effectively has a monopoly on the demand side, and, because of that position, negotiates the price of each drug with pharmaceutical companies.

A strong position on the demand side also characterises the large-scale food distribution sector, in which there are alliances of food retail chains, created with the aim of bargaining prices with producers taking advantage of the effect of combined volumes.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Generally, the IAA follows the European soft law and case law with regard to market definition. Specifically, a relevant product market comprises all those products or services that are regarded as interchangeable or substitutable by the consumer. Such an analysis is carried out considering the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services and in which the conditions of competition are sufficiently homogeneous and can be distinguished from neighbouring areas. The market in which it is relevant to assess a given competition issue is therefore established by the combination of the product and geographic markets.

A recent trend of the IAA that has to be taken into account is characterised by a case-by-case approach in the definition of the market both in dominance and in cartel cases.

In this sense, the recent decisions in the pharmaceutical sector represent an interesting example. Whether according to the EU principles, the relevant market is generally defined by considering the third (ATC3) level of the anatomical therapeutic chemical classification (ATC) in which pharmaceuticals are grouped in terms of their therapeutic indication (ie, their intended use), in its recent enforcement practice, the IAA often narrowed and/or specified the definition of the relevant market using a case-by-case approach.

In the recent *Aspen* case (A480 – *Incremento prezzo farmaci Aspen*), the IAA, for example, considered as relevant the market of the active substance (ATC5).

Another case that could be mentioned in this sense is the cartel case *Roche-Novartis* (I760 - *farmaci Avastin e Lucentis*) in which the IAA adopted a very peculiar approach, considering as competitors in a sole market two drugs (Avastin and Lucentis) in different ATC classes; the Authority based the said definition on the sole medical practice to use the oncologic drug (Avastin) as off-label for treatment in the ophthalmic field.

The Law does not provide for market-share thresholds with respect to the definition of dominance and of collective dominance. Market shares are generally used by the IAA as an indication of dominance, but many other factors are to be taken into account. Specifically, an undertaking could be considered as dominant even with a market share of less than 40 per cent, owing to its strength in the relevant market, its vertical integration, the high concentration of the relevant market, the modest competitors' market share, etc.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article 3 of the Law does not define the concept of abuse of dominance but only lists examples of abusive behaviour that relate to both exploitative and exclusionary practices.

Moreover, article 3 provides a non-exhaustive list of some examples of abuse, stating that it is prohibited:

- to directly or indirectly impose unfair purchase or selling prices or other unfair contractual conditions;
- to limit or restrict production, market outlets or market access, investment, technical development or technological progress;
- to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; or
- to conclude 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.

Abuse of dominance occurs when an undertaking in a dominant position engages in practices that influence the structure of a relevant market by reducing, hampering or eliminating the competition. The simple dominant position on a relevant market does not constitute an abuse, but the dominant firm holds a 'special responsibility' not to allow distorting effects on the competitive structure of the market.

Abuse of dominance is defined more in terms of the effects of a conduct on the market rather than in relation to the form or type of conduct. The Commission thus defines abuse as conduct that has the ability, by its nature, to foreclose actual or potential competitors from the market, and thus has the likely effect that ultimately prices will increase or remain at a supra-competitive level. If a conduct has exclusionary effects and it does not create any efficiencies, such conduct is presumed to be an abuse.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Both exploitative and exclusionary practices may constitute an abuse of a dominant position pursuant to article 3 of the Law (see question 10). It has to be considered that the majority of the proceedings conducted by the IAA consisted in exclusionary practices. Thus, all the proceedings opened in 2015 and 2016 consisted in exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Between dominance and abuse there must be a causal link, but the IAA considers conduct abusive in the meaning of the Law, even when there is no intent of the dominant company to abuse its dominant position.

When a company is in a dominant position, its abuse generally effects the market in which it is dominant, but it could also be possible that said abuse has its effect on a downstream, upstream or neighbouring market, and not necessarily in the one in which the company holds a dominant position. In any case, there must be a link between the dominant position and the alleged anticompetitive behaviour.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Following the EU principles, the IAA could consider, as justification, efficiencies that are sufficient to guarantee that no real harm to consumers is likely to arise. In this context, the dominant undertaking shall demonstrate that:

- the efficiencies have been, or are likely to be realised as a result of the conduct (for example, they may include technical improvements in the quality of goods, or a reduction in the cost of production or distribution);
- the conduct is indispensable to the realisation of those efficiencies: there must be no less anticompetitive alternatives to the conduct that are capable of producing the same efficiencies;
- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and
- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

When exclusionary intent is shown, efficiencies could not be used as a defence.

Specific forms of abuse

14 Rebate schemes

Even if rebates are, in general, standard commercial practices, in certain circumstances they may be unlawful if offered by a dominant undertaking and may result in a price discrimination between smaller and larger customers. Loyalty rebates are reductions in the list price of relevant products offered as an explicit or implicit reward in exchange for a relationship of substantial exclusivity. Said rebates are structured to provide benefits to customers that maintain or raise their purchasing (often also imposing heavy penalties in case they switch their purchasing expenditure towards another supplier). Loyalty rebates generally have similar effects to an exclusive dealing, since they basically 'force' a customer to purchase its total supply (or a significant part of it) from a specific supplier.

In its recent enforcement activity, the IAA had only few investigations on alleged rebate schemes. In this sense, it is relevant to recall the ongoing investigation against Unilever Italia (A484 – *Unilever/ Distribuzione gelati*) for an alleged abusive conduct in the industrial ice-cream market carried out, inter alia, through loyalty rebates. Specifically, according to the IAA, the rebates granted to retailers, that depended upon the achievement of specific obligations or selling targets, may constitute an abuse of dominance (see question 16).

15 Tying and bundling

Tying is a form of abuse of dominant position expressly considered in article 3 of the Law. The IAA would specifically seek action when an undertaking is dominant in the tying market, the tying and tied products are distinct products and the tying practice is likely to lead to anticompetitive foreclosure.

Even if said conduct is expressly considered in article 3 of the Law, the IAA has not faced any cases on tying and bundling in recent years.

16 Exclusive dealing

Exclusive dealing is one of the most economically significant forms of exclusionary abuse. Such practices have the effect of foreclosing entry of or expansion by competitors.

In its recent enforcement activity, the IAA had few investigations on alleged exclusivity clauses. In this sense, it is relevant to recall the ongoing investigation against Unilever Italia (A484 – *Unilever/ Distribuzione gelati*) concerning an alleged abusive conduct in the industrial ice-cream market, carried out, inter alia, through the provision of exclusivity clauses contained in contracts (see also question 14).

17 Predatory pricing

The IAA has always held that predatory pricing is abusive when a dominant undertaking charges prices at a level that pursues no other economic purpose than to drive out its competitors.

The leading case in this respect is the *Diano* case (A267 – *Diano*), where the IAA established the primary test for the predatory pricing analysis; specifically: (i) if the price is lower than the short-run average incremental costs, it will be presumed predatory; (ii) if the price is higher than long-run average incremental costs, it will be presumed not predatory; and (iii) if the price falls between the above two costs, it is necessary to assess case-by-case whether the price is predatory considering the competitive context of the dominant firm's behaviour, and in particular, evidence of the specific intent to drive out a competitor. The 'range' between the short-run average incremental costs and the long-run average incremental costs has to be taken into account.

In this context, it is relevant to mention the decision of the Council of State (Sent. 2302/2014) which confirms the annulment of the decision of the IAA in the case *Poste* (A413 – *Servizi postali*) regarding, inter alia, an alleged case of predatory pricing, owing to the wrong assessment of the long-run incremental costs.

18 Price or margin squeezes

Margin squeezing constitutes a type of abusive conduct in which a vertically integrated undertaking which is dominant on an upstream market may be able to exclude or inhibit those competing against its own downstream activities. Said conduct occurs when the relations between the upstream price decided by the dominant undertaking (which could be unfairly high) and the price offered by the same in the downstream market (which could be unfairly low) determines a 'squeezed' margin or profit for a competitor on the downstream market that could be basically forced out of the downstream market. Such type of abuse is increasing in significance and concern in the context of pricing for access to network. The crucial problem in this context regards the price at which the network owner can be required to provide access and thereby to facilitate competition on the downstream market. It is relevant to mention the recent decision of 15 May 2015 issued by the Council of State (the Supreme Administrative Court) in the case of *Telecom Italia* that confirms the IAA's previous decisions in this context. The court considered as a margin squeeze in violation of dominance rules the conduct of a dominant undertaking that granted rebates to consumers on the downstream market that its competitor on the downstream market (while being equally efficient) was not able to match, because of the high prices that the dominant undertaking charged on the upstream market.

More recently, the IAA opened a proceeding against Vodafone Italia and Telecom Italia for alleged abusive conducts in the bulk SMS market (A500A – *Vodafone-Sms Informativi Aziendali*, A500b – *Telecom Italia-Sms Informativi Aziendali*). According to the Authority, both companies would have abused their dominant position in the upstream market of SMS termination services through alleged abusive conducts aimed at excluding or limiting the ability to compete for customers in the downstream bulk SMS market applying prices that would leave an

insufficient margin, for any efficient competitor, to cover their own specific costs for providing the bulk SMS service to customers.

19 Refusals to deal and denied access to essential facilities

A dominant undertaking is required, in the absence of objective justification, to maintain contracts in force with existing customers and to permit access to essential facilities to competitors. An essential facility is a facility or an infrastructure without access to which competitors cannot provide services to their customers.

Refusals to deal and denied access to essential facilities constitute some of the most common types of abuse which lead to an entry barrier for competitors into a relevant market. The IAA has recently investigated different cases in this respect. Among these, the most memorable might be the *Acido colico* case (A473 – *Fornitura acido colico*) against Industria Chimica Emiliana SpA (and its subsidiary Prodotti Chimici ed Alimentari SpA). These proceedings were aimed at verifying if the company abused its dominant position in the relevant market of production and sale of cholic acid (used to produce a drug for liver diseases). The IAA believed that the aim of such conduct was to modify the competitive structure of the market by refusing to supply the input (the cholic acid) for the production of an active ingredient based on such acid. The proceeding was closed with the acceptance of the commitments proposed, without ascertaining the conduct.

Another interesting case in this context is the *SEA/Convenzione ATA* case (A474 – *SEA/Convenzione ATA*), recently upheld by the Italian Administrative Court of First Instance (TAR Latium) on 23 January 2016, alleging that SEA abusively interfered in the auction process for the sale of Società Acqua Pia Antica Marcia's in favour of ATA, frustrating the outcomes of the bid, with the aim of restricting access to Cedicor, a competitor of ATA, to the airport infrastructure-management market (see question 24).

20 Predatory product design or a failure to disclose new technology

Not applicable.

21 Price discrimination

While in different jurisdictions price discrimination is simply applied outside the context of dominance legislation (as, for example, with the US Robinson-Patman Act), in Italy price discrimination is only prohibited as an abuse of dominant position. Price discrimination occurs when different prices are applied by a dominant company to equal buyers and no discrimination exists when different situations are treated in a different manner. Owing to the difficulties to prove that the selective prices are not justified by economies of scales, mere price discrimination proceedings are very rare.

In this context, we can mention the recent *Akron* case (A444 - *Akron gestione rifiuti urbani a base cellulosica*) in which the IAA assessed that Hera, the holding company, abused its dominant position, inter alia, offering a special price to its subsidiary Akron, lower than the one available in a competitive market.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply are forms of abuse expressly provided for in article 3 of the Law (see question 1); these exploitative practices are less common than the exclusionary abuses.

Dominant firms cannot impose exploitative contractual terms and conditions which are unfairly troublesome for customers. In recent years, there have been no cases regarding exploitative terms of supply.

A dominant firm can charge a certain price in order to maximise its profits. However, since the dominant firm holds a 'special responsibility' not to avoid distorting effects to the competitive structure of the market, the imposition of unfair prices may be in violate article 102 TFEU and article 3 of the Law. Unfair pricing may be either unfairly low, intended to eliminate any competition on the market, or unfairly high, intended to achieve larger profits for the dominant undertaking than it would earn in a competitive scenario.

Specifically, the recent *Aspen* case (A480 – *Incremento prezzo farmaci Aspen*) may be of relevance in this context. The IAA ascertained that the companies of the multinational pharmaceutical group, Aspen, fixed prices for life-saving and irreplaceable drugs for hematological or oncological patients, resulting in price increases of up to 1,500 per cent.

23 Abuse of administrative or government process

The abuse of administrative process constitutes a peculiar type of abuse; in recent years, there has been an increasing number of investigations in this respect.

An important decision of the IAA in this respect was the *Esselunga-Coop Estense* case (A437 – *Esselunga/Coop Estense*), a decision confirmed by the Council of State, in which it was ascertained that Coop Estense abused its dominant position to the detriment of its competitor Esselunga, by acting in an obstructive and dilatory way, aimed at jeopardising the administrative procedures necessary for Esselunga, to obtain the authorisation to start a commercial activity and to open two sales outlets in the area of Modena. The conduct carried out by Coop Estense had led the public administration to adopt decisions that prevented Esselunga from entering the relevant market of supermarkets and hypermarkets in the Province of Modena.

Another interesting case to be mentioned is the *Pfizer* case (A431 – *Ratiopharm/Pfizer*), upheld by the Council of State, concerning the scope and limits of the use of the patent system by pharmaceutical companies. The judges upheld the Authority's view that the complexity of the patent system had been exploited by the dominant company merely to reduce competition without any justification in terms of innovation. In addition, the Court provided clear indications about the circumstances in which an otherwise legitimate protection of rights and interests may become an abuse of dominant position.

With reference to the abuse of government process, the IAA has not investigated any such cases.

24 Mergers and acquisitions as exclusionary practices

In the enforcement activities of the IAA, this type of abuse has only been analysed a few times.

In this context, see the decision (upheld by TAR Latium) in the *SEA/Convenzione ATA* case (A474 – *SEA/Convenzione ATA*).

According to the decision, SEA's abuse of dominance relates to Società Acqua Pia Antica Marcia's disposal of its 98.3 per cent stake in ATA Ali Trasporti Aerei SpA and ATA Ali Servizi.

Specifically, SEA, as sole operator of the airport infrastructures of Linate and sub-grantor to ATA, interfered with several conducts in the process of auction process for the sale of the company Società Acqua Pia Antica Marcia (see question 19).

It is also relevant to consider the *acido colico* case in which the alleged abusive conduct carried out by Industria Chimica Emiliana SpA (refusal to supply) started after the acquisition of its subsidiary Prodotti Chimici ed Alimentari SpA, active in the downstream market. Said acquisition allowed Industria Chimica Emiliana SpA to enter this market.

25 Other abuses

Not applicable.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The IAA (for public enforcement) and National Civil Courts (for private enforcement) are competent for the enforcement of article 3 of the Law and article 102 TFEU.

With reference to private enforcement, the Legislative Decree 3/2017, which implements the 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, identifies the business sections of the first instance courts of Milan, Rome and Naples as the only competent courts for antitrust private enforcement.

Public enforcement is carried out by IAA, empowered to establish the existence of anticompetitive behaviours and to impose administrative fines if necessary. The IAA can start an investigation at its own discretion, or at the initiative of a third party.

The authority has comprehensive powers of investigation towards private and public administrations. Pursuant to article 14 paragraph 2

of the Law, the IAA may request entities to supply any information in their possession and exhibit any documents of relevance to the investigation. In addition, it 'may conduct inspections of the undertaking's books and records and make copies of them, availing itself of the cooperation of other government agencies where necessary' (dawn raid) with the assistance of the financial police.

Dawn raids may only be conducted by the IAA at the companies' premises. Searches and seizures ordered by the authority do not need to be authorised by a judge or magistrate.

In the context of such an investigation, the officials are empowered to access premises, check all electronic and paper files and, if necessary, make copies of them and request information to be given verbally for the explanations on facts or documents relevant to the investigation. An immediate response is generally not required, and a written response may be provided to the IAA within a reasonable time frame. An employee or company representative is not required to answer any question which would lead to self-incrimination.

All the activities performed during the inspections, in particular all statements collected and documents acquired, have to be recorded in the minutes of the inspection (article 10 of Presidential Decree No. 217/1998).

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

According to the Law, the IAA is empowered to impose administrative fines when it ascertains the existence of an abuse of dominant position.

Firstly, pursuant to article 31 of the Law, for the computation of fines, the IAA may refer to the criteria set forth by Chapter I, Parts I and II of Law No. 689/1981 (general legislation concerning penalties for administrative offences).

Article 15 of the Law states that the IAA may impose a fine of up to 10 per cent of the worldwide turnover realised by each undertaking during the previous financial year. The percentage applied specifically depends on the duration and the gravity of the infringement.

The Authority adopted in 2014 its guidelines on sanctions aimed at defining a specific method for the determination of fines. These guidelines state that the basic amount of the fine to be considered is calculated on a percentage of the value of the company's sales directly or indirectly related to the infringement by the undertaking in the relevant market during its last full year of participation. Such basic amount is examined taking into consideration the gravity of the competition infringement. The resulting basic amount is then multiplied by the years of participation of the company in the contested infringement.

The guidelines also provide for an entry fee which is determined by increasing the basic amount by a percentage ranging between 15 per cent and 25 per cent of the value of sales, in case of most serious violations.

Specific mitigating or aggravating factors are also listed in the guidelines. In addition, it is also possible that the fine would be increased by up to 50 per cent if the company responsible has a particularly high total turnover worldwide compared with the value of sales of goods or services actually affected by the infringement, or else belongs to a group of a significant economic size.

Finally, it the above-mentioned 10 per cent limit for the total amount of the fine has to be taken into account (article 15 of the Law).

Regarding parental liability, according to European principles, parent companies may be held liable for infringements of competition law committed by the wholly (or almost) owned subsidiary. Indeed, according to European decisions, this liability subsists, because the companies represent a single economic entity.

Pursuant to article 8 of the Law, antitrust rules apply to undertakings. The IAA follows the EU principle according to which the concept of undertaking encompasses every entity engaged in an economic activity. Therefore, individuals may be fined if and insofar they are undertakings for the purposes of antitrust law, and, therefore, if they engage in economic activity in their own right. This is the case, for example, of sole traders or self-employed professionals.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The IAA is empowered to impose sanctions directly without petitioning any authority.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The IAA deals with few cases on abuse of dominance every year. Since the establishment of the IAA in 1990, around 100 proceedings have been opened on the basis of either article 3 of the Law or article 102 TFEU.

During the past year, the IAA closed three abuse of dominance proceedings, two accepting the commitments proposed by the parties, and the other ascertaining the violation of article 102 of the TFEU.

In particular, with reference to the latter, the IAA imposed a fine of €5 million on the pharmaceutical multinational group Aspen. The companies of the group fixed prices for life-saving and irreplaceable drugs for hematological or oncological patients, with a price increase of up to 1,500 per cent.

Aspen, thanks to its dominant position, started an aggressive and unjustified negotiation with the Italian Medicines Agency (AIFA).

First, Aspen required the classification of drugs in class 'C', despite being perfectly aware of the inadmissibility of this kind of regime, since these drugs are essential and irreplaceable.

Aspen then threatened AIFA that it would withdraw its pharmaceutical product, since the agency refused the unfair conditions formulated. The withdrawal of Cosmos drugs would have resulted in more costs for the National Health System and would have been detrimental to patients.

Finally, the companies exploited the unavailability of the drugs in the Italian market through an improper use of the stock allocation mechanism.

The IAA may to impose interim measures and adopt commitment decisions in the context of, inter alia, abuse of dominance proceedings.

However, the IAA rarely uses interim measures; such a position is followed also by most of the other national competition authorities and by the EU Commission, which has not ordered any interim measure since 2001. The only authority that stands out in its adoption of the interim measures is the French authority, which has ordered more than 30 interim measures since 2000.

The IAA is instead inclined to close the proceedings by adopting or accepting the commitments proposed by the parties, when possible.

The average length of abuse of dominance investigations before the IAA is about 240 days from the opening of the proceedings; it is relevant to consider that the IAA could postpone the date of the conclusion of the investigations for more than a year. In this light, the recent investigation against Unilever Italia (A484 – *Unilever/Distribuzione gelati*) for an alleged abusive conduct in the industrial ice-cream market is significant: its deadline was postponed for over a year (the proceedings should have initially terminated in June 2016 but were postponed until June 2017).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Contractual clauses in violation of article 101/102 TFEU or article 2/3 of the Law could be declared null and void (pursuant to article 1418 of the Italian Civil Code). It is relevant to mention that there is a debate among legal scholars on whether abuse of dominance has this effect on the validity of the agreement, since only article 101 TFEU and article 2 of the Law specifically state 'any agreements or decisions prohibited pursuant to this article shall be automatically void'.

The entire contract shall be declared void only if the clauses in violation of antitrust law are not severable from the rest of the agreement, meaning that the parties would not have entered it without such infringing clauses. Whether the infringing clause declared null and void is by law replaced by the mandatory rules, the validity of the rest of the contract is not affected (see article 1419 of the Italian Civil Code).

Update and trends

In light of the recent approval of the Legislative Decree 3/2017, which implements the 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, a significant development of the private enforcement is expected. Specifically, the main goal of the new rules could be foreseen in the necessity to overcome information asymmetry between the parties, which characterises antitrust private action, through the introduction of a strengthened mechanism of evidence disclosure and the introduction of the binding effect of IAA's decisions.

The Decree also applies new rules for the limitation periods ensuring that a limitation period is suspended if the IAA takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates.

Moreover, as is known, Italian merger control is not based on the substantial lessening of competition test but still on the dominance test. In this light, article 16 paragraph 1 of the Law requires prior notification of all mergers and acquisitions involving undertakings whose aggregate turnover in Italy exceeds €495 million and if the aggregate turnover in Italy of the undertaking to be acquired exceeds €50 million. With such high and cumulative turnover thresholds, as the current ones in Italy, the IAA analyses only few concentrations and loses control of the markets. In this light, it is expected a legislative intervention in the Italian merger control procedure and, specifically, on turnover thresholds. An efficient merger control is fundamental since, through the analysis of a concentration, it permits the analysis of the relevant markets involved and of their competitive dynamics and avoids the creation or strengthening of dominant positions.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The Legislative Decree 3/2017 identifies the business sections of the first instance courts of Milan, Rome and Naples as the only competent courts for antitrust private enforcement (see question 26).

Such sections are also competent to decide on requests for interim relief related to infringements of Competition law, including the refusal to supply or to grant access to 'essential facilities'.

It is relevant to mention the decision of the Council of State in *Cargest* No. 11564/2015, a standalone action. In this case, the Council of State annulled the decision of the Court of Appeal which mechanically applied the principles of the burden of proof, avoiding to evaluate the opportunity to exercise, ex officio, its powers of investigation. The Court has reached this solution considering the difficulties that the claimant faced in his attempt to prove the anticompetitive infringement without a previous decision of the Authority. Thus, it is necessary to grant judicial protection also through a specific interpretation of procedural provisions. In each case, this interpretation has to be functional to the implementation of competition law and has to ensure the right of defence. Claimant has the onus of proving serious grounds capable of demonstrating that the conduct could restrict the freedom of competition. Regarding case law following the above-mentioned *Cargest* decision, the courts seem to rigorously follow the principle set by the Council of State. For example, the business section of the Civil Court of Milan, in its decision dated 13 April 2016, totally rejected the claims brought by the company ArsLogica Sistemi, which brought an action against IBM Italia, alleging abuse of a dominant position. The judge accepted the allegation of IBM, objecting that the claimant did not offer the Court serious ground capable of demonstrating the relevant market and the dominance of IBM.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

A company that suffered damages by an abuse of dominant position in violation of article 3 of the Law or article 102 of the TFEU can directly claim damages from the dominant undertaking before civil courts.

The plaintiff filing an action for damages has to prove that it was harmed by the anticompetitive conduct.

More precisely, it must prove: the existence of abusive conduct by the defendant; unfair damages; and the existence of a causal link between the abusive conduct and the damage suffered.

It is worth mentioning that on 14 January 2017, the Italian Council of Ministers approved Legislative Decree 3/2017, which implements the 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.

One of the main changes could be seen in the strengthened mechanism of evidence disclosure in the context of antitrust damages actions. The judge has the possibility to request evidence that lies in the control of the defendant or a third party as well as evidence included in the file of the IAA. The set of conditions regarding the disclosure of evidence entails substantial innovation for the applicants' position in the proceedings, with reference to the extremely high standard of proof and the structural information asymmetry between the parties which characterise antitrust damage actions.

Another topic that it is necessary to mention concerns the rules governing the effect of national decisions: an infringement of competition law found by a final decision of the IAA or by a review court is deemed to be irrefutably established for the purposes of an action for damages. This provision entails nothing less than a 'procedural revolution'. Indeed, according to the case law of the Italian Civil Supreme Court, the defendants in damages actions could call into question the findings contained in the decisions of the IAA, though subject to strict conditions (it should be remembered that, in Italy, the 'technical aspects' of the decisions of the IAA did not fall within the borders of the power of judicial review of the administrative courts). Such provision definitely deprives the defendants of this possibility.

The trend of follow-on actions before civil courts is increasing. Damages actions regarded different sectors: inter alia, telecommunications, energy, transport, airports. A significant number of actions in this respect followed the IAA decision on the cartel of the car insurance market. With reference to the abuse of dominance cases, the main actions regard the telecommunication sector. Most of the cases were decided and are pending before the Court of Milan; the situation is due to the economic context of the region where most of the biggest Italian companies are based. By contrast, other competent courts have seen only few cases in this respect.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The decision of the IAA can be appealed before the Italian Administrative Court of First Instance (TAR Latium), whose judgment can be appealed before the Supreme Administrative Court (Council of State), both located in Rome.

Pursuant to article 33 paragraph 1 of the Law, administrative courts have jurisdiction over appeals of the decisions of the IAA.

Thus, the decision of the IAA can be appealed before the Italian administrative court of first instance within 60 days from its notification, whose judgment can be appealed before the Council of State.

The appeal before the Administrative Court is essentially limited to the review of the legality of the IAA's decisions. It represents a control of legality based on three aspects: lack of jurisdiction, violation of law and misuse of power. Pursuant to the relevant case law, the review should be limited to aspects such as logical faults, clear error in evaluation, error in investigation or motivation. The judge also has to verify the correct application of law and its interpretation. In these terms, the administrative courts are empowered to exercise effective control on the economic assessment of the Authority and the real limit for the Administrative Court lies in the prohibition of replacing the Authority in its activities.

Pursuant to article 134 of the Administrative Code, the administrative judge has full jurisdiction on fines and may remove or reduce the amount of fines imposed by the IAA.

The judgment of first instance can be appealed before the Council of State within 30 days of its notification or three months of its publication. Exceptionally, the judgments of the Council of State could be appealed before the Italian Civil Supreme Court for jurisdictional and competence issues or for revocation.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Article 3 of the Law only applies to companies holding a dominant position on a relevant market.

It is relevant to mention that article 9 of Law No. 192/1998 prohibits the conduct of an undertaking that abuses the economic dependence of another company. The economic dependence occurs when a company has market power over another company so as to be able to impose unfair conditions in a contract. Any contract, or severable clause thereof, resulting from such abuse is void. Whether such an abuse occurred is analysed based on an assessment whether the allegedly dependent undertaking had the possibility to find alternative business partners. The IAA is competent in this field if the abuse of economic dependency may affect competition and the market. However, only in one recent case, the IAA indeed ended proceedings regarding this kind of practice with a fining decision (RP1 – *Violazioni dei termini di pagamento*), imposing €800,000 in fines on Hera for repeated infringement of the Italian applicable law on payment terms. Economic dependency law can also be enforced through the court system in damages actions and there have been several cases in this respect since its introduction.

Moreover, article 62 of Law No. 27/2012 prohibits certain types of conduct by the supplier of agricultural and food products in Italy. These prohibitions largely concern practices that could, in theory, be sanctioned under the abuse of dominance rules, but they do not require the relevant authority to ascertain a dominant position on the relevant market.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The behaviour of dominant firms is regulated under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947) (Anti-Monopoly Act, hereafter referred to as the AMA). There are two key concepts under the AMA: 'private monopolisation' and 'unfair trade practice'.

Private monopolisation is banned in the first sentence of article 3 of the AMA. There are two types of private monopolisation: the 'exclusionary type of private monopolisation' and the 'control type of private monopolisation'. The exclusionary type of private monopolisation occurs when a dominant firm, alone or in cooperation with another firm, attempts to exclude competitors from the market and thereby monopolises the market by hindering new entrants through means such as selling at a price so low as to discourage competition. The control type of private monopolisation occurs when a firm tries to dominate the market by restraining the business activities of other firms through such means as acquiring shares in order to obtain control of competitor firms in collaboration with third parties or unilaterally.

With respect to the exclusionary type of private monopolisation, the Japan Fair Trade Commission (JFTC) published the 'Guidelines on Exclusionary Private Monopolisation' (the Guidelines) on 28 October 2009. These Guidelines mainly deal with the application of the exclusionary type of private monopolisation but its contents are also useful when analysing the application of the control type of private monopolisation.

Unfair trade practices are banned under article 19 of the AMA. The JFTC has provided a 'general designation' of what constitutes an unfair trade practice that is applicable to all industries. The JFTC has also provided 'special designations' targeting specific business operators and industries. Specifically, there are three special designations: for large retailers, for specified shippers and for the newspaper industry.

The unfair trade practices cited in the general designation include acts such as refusal to trade, discriminatory treatment, tie-in sales, trading on exclusive terms, trading on restrictive terms, resale price maintenance and unjustly inducing customers. Further guidance is provided by the Guidelines Concerning Distribution Systems and Business Practices.

There are a variety of guidelines regarding the characteristics of specific business fields (logistics of the gasoline, electricity, home electric appliances, and other industries), dumping, intellectual property rights, franchising and other conduct, which explain what types of conduct are likely to raise concern as unfair trade practices in these fields.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is a defined word under the AMA. Theoretically, one is not required to establish a dominant position when establishing a 'private monopolisation'. However, in order to constitute private monopolisation, it is necessary to prove the effect of substantial restraint on competition by controlling or excluding other companies. Therefore, in practice, it must be established that the firm has the market power necessary for controlling or excluding other companies. According to the Guidelines, when deciding whether to investigate a case as exclusionary private monopolisation, the JFTC will prioritise the case if the share of the product that the firm supplies exceeds approximately 50 per cent after the commencement of such conduct. Therefore, market share is one of the important elements when analysing whether the conduct amounts to private monopolisation.

One item of note is that, in Japan, in one category of unfair trade practices, there is a concept called 'abuse of superior bargaining position'. This refers to the conduct of dealing in a way disadvantageous to a business partner by making use of one's superior bargaining position unjustly, in light of normal business practices. Regarding this type of conduct, a dominant position in a market is not required. It is generally understood that it is sufficient if an entity has a relatively superior position in relation to the counterparty in the transaction.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

It is generally understood that the direct purpose of the AMA is 'to promote fair and free competition'. Additionally, the ultimate purpose of the AMA is to promote the democratic and wholesome development of the national economy, as well as to secure the interests of general consumers.

To regulate private monopolisation is one way to achieve the purpose of the AMA. The AMA, itself, has no intention to specifically protect other public interests or social purposes.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are some sector-specific regulations and rules, including for the telecommunications sector and the energy sectors.

A company operating in the telecommunications sector is subject to the Telecommunications Business Act (TBA). The TBA is under the jurisdiction of the Ministry of Internal Affairs and Communication (MIC).

Although the MIC does not focus on monopoly regulation, the 'Guidelines for Promotion of Competition in the Telecommunications Business Field' were jointly created by the MIC and the JFTC, and provide guidance on monopolisation issues in this sector. These guidelines were updated on 28 May 2016.

The major amendment to these guidelines was the addition of the following topics:

- the connection and sharing of telecommunications facilities;
- the provision of telecommunications services;
- provision of content services; and
- the manufacture and sale of telecommunications facilities.

In relation to the energy sector, the Ministry of Economy, Trade and Industry (METI) and the JFTC jointly developed the Guidelines for

Proper Electric Power Trade. These guidelines were recently updated on 6 February 2017. The purpose of this update was to add guidance for the trade of 'Negawatt power' (negawatt power being a theoretical unit of power representing an amount of electrical power saved).

Specifically as regards trade of gas, the METI and the JFTC jointly developed the Guidelines for Proper Gas Trade. These guidelines were updated on 6 February 2017. The purpose of this update was to add guidance for new proper trade in the gas market after the full retail liberalisation of the gas market.

The key aspects of the amendment added guidance on the following topics:

- appropriate gas trading in the retail field;
- appropriate gas trading in the wholesale field; and
- appropriate gas trading regarding the Transportation Service.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

There are no rules exempting certain undertakings from the rules concerning dominance. Under case law, entities that are subject to the AMA include any entity, regardless of its legal form, that operates a commercial, industrial, financial or any other business but is not a consumer. Therefore, foundations, unions, nations and local governments may be an undertaking that is subject to the AMA.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The AMA covers the conduct of non-dominant companies attempting to become dominant, as well as the conduct of dominant companies maintaining or strengthening their dominant position by way of excluding or controlling other firms in their business activities.

7 Collective dominance

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

The AMA covers both single firm dominance and dominance of multiple parties connected by way of mutual agreement or arrangement. However, collective dominance without any coordinated conduct is outside the scope of the AMA.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The AMA does not have a specific provision that precludes the regulation of a dominant purchaser. Consequently, conduct by which a dominant purchaser excludes or controls other companies, as well as similar conduct of monopolistic suppliers, may be subject to the AMA as constituting private monopolisation or unfair trade practices.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The Guidelines (section 3: 'Substantial Restraint of Competition') provide the basic stance as follows: a particular field of trade (the definition of market) means the scope where the exclusionary conduct causes a substantial restraint of competition. There are two types of markets, the product market and the geographic market. The product market is determined based on factors such as usage, changes in price, quantity, etc, and recognition and behaviour of users. The geographic market is determined based on factors such as the business area of suppliers and the area in which the users purchase, the characteristics of the products, and the means and cost of transport. This approach is similar to the analysis used in the context of merger control. The method of analysis with respect to merger control is stipulated by the Guidelines to Application of the Antimonopoly Act concerning the Review of Business Combination.

According to the Guidelines, when deciding whether to investigate a case as constituting exclusionary private monopolisation, the JFTC will prioritise the case if: the share of the product that the firm supplies exceeds approximately 50 per cent after the commencement of such conduct, and the conduct is deemed to have a serious impact on the lives of the citizenry after comprehensively considering relevant factors such as market size, the scope of the business activities of the said firm and the characteristics of the product. However, even if a case does not meet these criteria, it may be subject to investigation as constituting exclusionary private monopolisation depending on the type of conduct, market conditions, positions of the competitors, and other factors.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The regulation in Japan does not take the form of abuse of dominance. Thus, abuse is not directly defined under the AMA. However, it is generally understood that, for both private monopolisation and unfair trade practices, there are certain types of conduct that may be regulated by the JFTC, and these types of conduct are somewhat similar to the concept of abuse.

With respect to private monopolisation, the AMA and Guidelines provide an illustrative list of problematic conduct. In particular, the Guidelines refer to past cases and describe the following four typical types of exclusionary conduct: 'below-cost pricing (setting a product price below the cost)', 'exclusive dealing', 'tying', and 'refusal to supply, and discriminatory treatment'. For each type of conduct, the Guidelines provide factors to be considered when assessing whether the alleged conduct constitutes exclusionary conduct. The Guidelines also state that the type of exclusionary conduct that constitutes exclusionary private monopolisation is not limited to the types of conduct that fall under these four typical types of exclusionary conduct.

Additionally, in an effects-based approach, the AMA further requires that a substantial restraint of competition be proven in order for the conduct to be prohibited as private monopolisation.

Therefore, private monopolisation is defined by both form-based conditions and effect-based conditions, so both are required.

In terms of private monopolisation and unfair trade practices, there is no conduct that is per se illegal under the AMA.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Both exploitative and exclusionary practices are covered by the concept of abuse.

With respect to exclusionary practices, the Guideline explicity covers these (see question 1).

With respect to the exploitative practices, unlike the exclusionary practices, the AMA is silent on this. Since the concept of private monopolisation is defined by general terms, theoretically any conduct can constitute private monopolisation. However, there have not been any cases to date. In general, exploitative practices are regulated as 'abuse of superior bargaining position', which is a type of unfair trade practice.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

With respect to both private monopolisation and unfair trade practices, the JFTC needs to prove a linkage between the conduct and the result of substantial restraint of competition or prove that the conduct has the tendency to impede fair competition in the relevant market.

With respect to an adjacent market, conduct by a dominant firm could be regarded as abusive if it occurs on a market adjacent to a dominant market. As an example, in the case of tying or bundling sales,

such sales methods may amount to abuse on an adjacent market by leveraging the market with market power.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In general, if the conduct is somehow justified, allegations of private monopolisation or unfair trade practices cannot be established. The assessment of private monopolisation and unfair trade practices is carried out by considering the actual impact on competition.

The Guidelines state that efficiency (efficiency of business activities which are caused by the economics of scale, integration of production facilities, specialisation of facilities, reduction of transportation costs, and improvement of the efficiency of research and development systems) or special circumstances in relation to the protection of consumer benefits and other standard market analysis components (ie, potential competitive pressure, customer's bargaining power, etc) may be considered in determining whether the conduct causes a 'substantial restraint of competition' or has the tendency to impede fair competition in the relevant market. This means various business justifications are available as defences.

As for special circumstances in relation to the protection of consumer benefits, the Guidelines give the following example: A case where a gas equipment sales company with approximately 50 per cent market share in a region sells its gas equipment with an imperfect combustion prevention device to someone who uses gas equipment without the device. The equipment is sold at a price lower than the cost required for its supply in order to stimulate replacement demands for gas equipment with the devices and prevent serious accidents caused by carbon monoxide poisoning. Under those circumstances, the conduct is considered to be for the purpose of preventing serious accidents before they happen. Further, the conduct is considered to serve the interests of general consumers and more likely to have limited influence on competition. Therefore, the JFTC will consider such circumstances to assess whether or not competition is substantially restrained.

To constitute private monopolisation and unfair trade practices, there is no requirement that there be an intent to exclude a third party, though the Guidelines state that such an intent is one of the important factors leading to a presumption that the alleged conduct constitutes exclusionary conduct (abuse). Therefore defences can be shown even where there is intent, but the threshold would be higher.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

The Guidelines state that retroactive rebates and incremental rebates are likely to have restrictive effects. With respect to the progressiveness of rebates, the Guidelines state that when the level of the rebate is progressively set in accordance with the quantity of trade in a specified period, the rebate effectively causes customers to deal with the dominant firm with greater preference than the dominant firm's competitors. Additionally, customers would be more likely to purchase more products from the dominant firm than from competitors. This type of rebate is more likely to restrain the business of competitors.

With respect to the retro-activeness of rebates, the Guidelines state that if rebates are given for the entire quantity of trade made thus far in a case where the quantity of trade has exceeded a certain threshold, the rebates effectively cause the customers to deal with the dominant firm with greater preference than the competitors. Additionally, customers are more likely to purchase more products from the dominant firm than when rebates which exceed the threshold required for rebates are given only for a portion of the quantity of trade. Such a rebate is highly effective in restraining the business of competitors.

15 Tying and bundling

Tying and bundling may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

The Guidelines state that where tying causes difficulties in the business activities of competitors who are unable to easily find alternative customers in the market of the tied product, such conduct is regarded as exclusionary conduct or abuse. The JFTC comprehensively considers the following factors when assessing whether the conduct would cause such difficulties for competitors:

- conditions of the entire market where the tying occurs;
- position of the tying firm in the market of the tied product (market share, ranking, brand power, excess supply capacity and business size);
- positions of the tying firm's competitors in the market of the tied product (market share, ranking, brand power, excess supply capacity and business size);
- duration of the conduct, number of customers and trading volume; and
- nature of the conduct.

16 Exclusive dealing

Exclusive dealing may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

The Guidelines state that where a firm deals with its trade partners on the condition that transactions with the firm's competitors are prohibited or restrained, and the competitors cannot easily find an alternative supply destination, such exclusive dealing may cause difficulties to the business activities of the competitors and undermine competition. Thus, dealing with the trade partners on the condition that transactions with the competitors be prohibited or restrained may be regarded as exclusive conduct or abuse.

The JFTC will comprehensively consider the following factors when assessing whether the conduct would cause any difficulties for competitors:

- conditions of the entire market of the product;
- position of the firm requiring exclusivity from trade partners in the market (market share, ranking, brand power, excess supply capacity and business size);
- positions of the competitors in the market (market share, ranking, brand power, excess supply capacity and business size);
- duration of the conduct, number of customers and shares; and
- nature of the conduct.

17 Predatory pricing

Predatory pricing may constitute private monopolisation when used to exclude business activities of other firms, thereby causing a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

The Guidelines state that when a firm sets a very low price that does not even allow the recovery of the cost of the products, where such cost would not be generated unless the product was supplied, and where the amount of loss to the firm grows larger as it increases the supply of the product, such conduct lacks economic rationality except in extraordinary circumstances. Therefore, depriving competitors of customers by setting such a low price would not reflect normal business efforts or normal competitive behaviour and makes it difficult for an equally (or more) efficient competitor to compete, thereby possibly undermining competition. Thus, setting a price below the cost of supplying the product ('below-cost pricing') may be regarded as exclusive conduct or abuse.

As a benchmark of whether or not the cost constitutes below-cost pricing, the Guidelines adopt the formula of the average avoidable cost (AAC). AAC is the expense per unit of product, calculated by dividing the additional supply amount by the sum total of fixed costs and variable expenses that will not occur if the undertaking ceases to supply the additional amount

There is no requirement of recoupment to constitute private monopolisation under the AMA when setting a predatory price.

18 Price or margin squeezes

Price or margin squeezes may constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. If the conduct does not amount to private monopolisation, it may instead be regulated as an unfair trade practice.

The Guidelines state that the issue of whether a 'margin squeeze' will be deemed exclusionary will be analysed from the same viewpoint as 'supply refusal or discriminatory treatment'. That is, refusing to supply less than a reasonable range of products necessary for a supplier to conduct business activities in the downstream market constitutes exclusionary conduct, and thus amounts to private monopolisation (exclusionary type).

In particular, the following two factors are key in the analysis: the product to be supplied is a 'necessary product' in order to conduct business activities in the downstream market downstream, and the refusal to supply is 'out of the reasonable range'.

In order to assess whether the product is a 'necessary product', the Guidelines indicate that the following factors are present: (i) the product is an unsubstitutable and indispensable product for trading customers to carry out business activities in the downstream market; and (ii) it is realistically impossible for trading customers to produce the product through the trading customer's own effort, such as investment and technological development.

The one representative case is the *NTT East* case. In this case, NTT East Japan (Japan's largest landline telecommunications company) entered the FTTH service market in East Japan (a communication service using optical fibre for detached houses), while requiring existing competitors to pay NTT East Japan a business fee for starting a new FTTH service connecting to optical fibre. The allegation was that by excluding the business activities of other telecommunications carriers in the FTTH service market by setting a low user-specific fee, NTT East Japan limited competition in the trading field in eastern Japan, which was against the public interest as it was a private monopolisation. The court held, among other things, that a margin squeeze is regarded as a conduct having both aspects of a 'single and one-sided transaction refusal' or 'bargain sale'. Furthermore, in assessing the illegality of NTT East Japan's conduct under the AMA as a margin squeeze, one consideration was the requirement for competitors of products and services offered by market-dominant operators in the upstream market.

19 Refusals to deal and denied access to essential facilities

Refusals to deal and denied access to essential facilities may constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. If such types of conduct do not amount to private monopolisation, they may instead be regulated as unfair trade practices.

In particular, the following two factors would be key in the analysis: the product to be supplied is to be regarded as 'essential facilities' in order to conduct business activities in the market (downstream), and the refusal to supply is 'out of the reasonable range'.

In general, an essential facility is defined as an indispensable facility or facility for conducting certain business activities and it is considered economically or technically impossible or extremely difficult to establish such facility. Typical examples are telecommunications, electricity, gas and transportation, which require huge initial capital investment.

20 Predatory product design or a failure to disclose new technology

Predatory product design or a failure to disclose new technology may constitute private monopolisation when used to exclude business activities of other firms, and thereby cause a substantial restraint on competition. If such types of conduct do not amount to private monopolisation, they may instead be regulated as unfair trade practices.

There have been no cases in which predatory product design or a failure to disclose new technology has been deemed to constitute either private monopolisation or unfair trade practices.

21 Price discrimination

Price discrimination may constitute private monopolisation when used to exclude business activities of other firms, and it thereby causes a substantial restraint on competition. If such acts do not amount to private monopolisation, they may be regulated as unfair trade practices.

There are no particular price discrimination laws that apply other than those governing monopolisation and unfair trade practices.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply may constitute private monopolisation when used to exploit business activities of other firms and they thereby cause a substantial restraint on competition. If such acts do not amount to private monopolisation, they may be regulated as unfair trade practices.

Under the AMA, there is no concrete stance on how to regulate exploitative prices. Some commentators say that it might be possible to consider exploitative prices to be regulated as an 'abuse of superior bargaining position' which is a type of unfair trade practice. Generally, establishing remarkably high or low consideration with a counterparty while in a superior position currently corresponds to the act of 'abusing a superior position'.

23 Abuse of administrative or government process

An abuse of administrative or government process by undertaking may constitute private monopolisation when used to exclude the business activities of other businesses, and the acts cause a substantial restraint on competition. If such acts do not amount to private monopolisation, they may be regulated as unfair trade practices.

There is a reference case, which is known as the *Hokkaido Newspaper* case. In this case, a newspaper company filed a trademark that a competitor was likely to use, but they had no intension of using such trademark, and set a discounted price for advertisement even though advertisement revenue is important for the newspaper business. With regard to these consecutive measures taken by the newspaper company, the JFTC concluded that these series of conducts constituted an exclusive private monopoly by the newspaper company as new competitors were precluded from entering the market by the trademark and a significantly discounted advertising rate.

Another reference case is the *Japan Medical Food Association* case. Here, a manufacturer of medical foodstuff with a dominant position had asked the Japan Medical Food Association to establish a very complicated registration system that did not easily allow competitors to register for medical food sales. As a result, rival companies and their affiliates had difficulty registering sales of medical foods and were practically excluded from the market. The JFTC concluded that the establishment of a system that did not easily allow competitors to register for medical food sales by such dominant company through the Japan Medical Food Association constituted a private monopolisation as the competitors were precluded from entering the medical food market by the abuse of the registration system for the medical sales market.

24 Mergers and acquisitions as exclusionary practices

Abuse in the context of mergers and acquisitions is principally controlled through the merger-filing procedures or prohibitions under the AMA. Under the merger control system in Japan, the JFTC will review a transaction from the viewpoint of whether it creates a business combination that may substantially restrain competition in any particular field of trade, or where a business combination is created through an unfair trade practice. This approach is basically in line with the analysis of private monopolisation.

By contrast, as the concept of private monopolisation is defined by general terms, theoretically, any conduct can constitute private monopolisation (control type or exclusion type). Therefore, mergers and acquisitions may constitute private monopolisation when used to exclude business activities of other firms, and they thereby cause a substantial restraint on competition. However, there have been no cases in which mergers and acquisitions directly have been deemed to be private monopolisation and unfair trade practices.

25 Other abuses

The concept of private monopolisation is defined by general terms, but the Guidelines clarify the meaning of monopolistic acts by setting out some typical categories of conduct. The Guidelines note that such categories are not exhaustive, and theoretically, any conduct can constitute private monopolisation (control or exclusion). Moreover, the JFTC

responds to each case on a case-by-case basis, so new kinds of conduct may be considered as abusive acts.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The JFTC is responsible for the enforcement of the AMA.

Under the AMA the JFTC has the power to do the following:

- order persons concerned with a case or a witness to appear to be interrogated, or to collect their opinions or provide a report;
- order expert witnesses to appear to give expert opinions;
- order persons holding books and documents and other objects to submit such objects, or maintain such submitted objects at the JFTC; and
- enter any business office of the persons concerned with a case or other necessary sites, and inspect the conditions of the business operation and property, books and documents, and other materials.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

As for private monopolisation, the JFTC can issue a cease-and-desist order. Furthermore, the JFTC can impose an administrative fine. The amount of surcharge is calculated by mutiplying the amount of sales of the object products or services during the period in which private mopolisation was implemented (the maximum is three years) by the surcharge calculation rate in the following table. Administrative fines on private monopolies were introduced in January 2006 for the controlling type of private monopolisation, and in January 2010 for the exclusionary type of private monopolisation. To date, there has been no case in which an administrative fine was imposed.

	Manufacturer	Retailers	Wholesalers
Exclusionary type of private monopolisation	6%	2%	1%
Controlling type of private monopolisation	10%	3%	2%

Theoretically, an undertaking who engages in private monopolisation would be subject to a criminal penalty under the AMA. However, until now, the JFTC has never issued criminalised charges based on private monopolisation.

As for unfair trade practices, the JFTC can issue a cease-and-desist order. Furthermore, for certain types of unfair trade practices, the JFTC can impose an administrative fine as follows, depending on the applicable category:

	Manufacturer	Retailers	Wholesalers
Joint refusal of trade Predatory pricing Price discrimination	3%	2%	1%
Abuse of superior bargaining position	1%	1%	1%

An undertaking that engages in unfair trade practices would not be subject to a criminal penalty.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The JFTC can issue a cease-and-desist order without the involvement of any other authority. However, if the JFTC seeks to issue a cease-and-desist order, it must conduct a hearing with the would-be addressee of the cease-and-desist order.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In recent years, there have not been many cases concerning private monopolisation. Regarding that point, it is said that the introduction of a non-discretionary surcharge system may have made the JFTC hesitant to move forward as the party is likely to fight to the end in the event a surcharge is imposed.

In addition, after the introduction of an administrative fine for both types of private monopolisation, there has been no case to date in which an administrative fine was imposed.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Generally, only clauses in agreements and contracts that infringe on the AMA are likely to be considered null and void between the parties and not the entire agreement invalidated.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The operation of the AMA is exclusively within the purview of the JFTC. However, any person who believes that there has been an infringement of the AMA can report the relevant facts to the JFTC and request that

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appropriate measures be taken. In such cases, the JFTC is obliged to conduct at least a preliminary investigation. Only selected cases trigger a formal full-fledged investigation.

With regard to unfair trade practices, it also is possible to file a lawsuit in court seeking an injunction against the other party. Such special injunctions are not available in cases of private monopolisation.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

In cases where a third party has suffered damages and is requesting damages owing to an act in violation of the AMA, a claim based on article 709 of the Civil Code and a claim under article 25 of the AMA may be considered.

Claims based on article 25 of the AMA are premised on the condition that the cease-and-desist order has become final and binding.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

An undertaking which is the subject of a cease-and-desist order or an administrative fine order can file a suit for cancellation of those orders (administrative disposition) with the court within six months from the date of the order (Administrative Case Litigation Act article 14).

Unlike ordinary administrative lawsuits, a violation of the AMA is targeted for complex economic matters. Because of the high level of expertise required, all actions for revocation of an administrative disposition shall be filed in the Tokyo District Court.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Not applicable.

Korea

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Article 3-2(1) of the Monopoly Regulation and Fair Trade Act (MRFTA) proscribes the following acts as the abuse of a market-dominant position:

- conduct that unreasonably determines, maintains or changes the price of goods or services;
- conduct that unreasonably controls the output of goods or services;
- conduct that unreasonably interferes with business practices of other entities;
- conduct that unreasonably impedes or forecloses market entry; and
- conduct that unfairly excludes competitors or significantly harms consumer interests.

According to MRFTA's delegation under article 3-2(1), the Korea Fair Trade Commission's (KFTC) Guidelines for the Review of Abuse of Market-Dominant Position (Guidelines) and article 5 of the MRFTA Enforcement Decree specifically provide the standards of review for a relevant market ('a certain line of trade') and market-dominant position as well as the list of the abusive acts set forth above.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

A dominant firm refers to any firm, by itself or with other firms, that can determine, maintain, or change price, quantity or quality of goods or services as a supplier or customer in a particular market (article 2(7) of the MRFTA). Criteria for dominance include:

- market share;
- barriers to entry;
- relative size of competitors;
- possibility of collusion among competitors;
- existence of similar products or adjacent markets;
- possibility of market foreclosure; and
- financial resources (section III of the Guidelines).

Among the criteria for dominance, in practice, the KFTC views market share as the most important indicator of dominance, and case law generally follows suit.

The MRFTA does not recognise different types of dominance such as 'relative dominance'. However, abusive acts by a non-dominant firm with a superior trading position against its business counterpart can still be sanctioned as an unfair trade practice (article 23 of the MRFTA).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the MRFTA is to promote fair and free competition, encourage creative business activities, protect consumers, and strive for balanced development of the national economy (article 1 of the MRFTA). Thus, regulation of dominance under the MRFTA is not strictly economic but considers policy implications of the regulation, such as consumer protection, small businesses and the national economy.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Other than the MRFTA, the Telecommunications Business Act (TBA) could be an example of sector-specific provisions. According to the TBA, an operator that provides key telecommunications services, as in telecommunications services for transmitting or receiving sound, data, images, etc (common telecommunications services), determined and publicly announced by the Minister of Science, ICT and Future Planning in consideration of the market size, the number of users, the conditions of competition, etc, from among telecommunications services provided by a common telecommunications business operator who has the largest market share based on the turnover of the preceding year in a unit market demarcated after considering substitutability of demand or substitutability of supply of services and the geographical range for providing services, must determine service charges and the terms and conditions of use for each service type, and report thereon (including cases of reporting modified matters) to the Minister of Science, ICT and Future Planning (article 28(2) of the TBA). Also, a common telecommunications business operator that possesses equipment and facilities indispensable to other telecommunications business operators for providing telecommunications services must provide equipment and facilities to telecommunications business operators (article 35(2) of the TBA), and such common telecommunications business operator whose market share based on the turnover of the preceding year exceeds 50 per cent in a unit market demarcated after considering the abovementioned criteria, must permit access to or joint use of the telecommunications equipment or facilities (article 41(3) of the TBA). Where a telecommunications business operator is subject to a measure or a penalty surcharge on the grounds of committing prohibited acts, the telecommunications business operator shall not be subject to a corrective measure or penalty surcharge under the MRFTA on the same grounds (article 54 of the TBA). However, unless there is a clear provision that rules out the application of MRFTA in other laws, MRFTA would still apply to all sectors.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules apply to any dominant firms. Both suppliers and customers are subject to the rules as well as the public entities. The dominance rules also apply to foreign firms abroad when their business activities affect the domestic market (article 2-2 of the MRFTA).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The MRFTA only provides for the behaviour of firms that are already dominant. The conduct of a non-dominant firm seeking market

dominance is not subject to the legislation, but in some cases, it may be sanctioned as an unfair trade practice under article 23(1) of the MRFTA. Furthermore, the provision on business combination provides a structural remedy to prevent beforehand the emergence of a dominant firm with a potential to inflict anticompetitive effect in a relevant market. (article 7 of the MRFTA).

7 Collective dominance

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

There is some ambiguity as to whether the MRFTA explicitly covers the concept of collective dominance or shared monopoly.

Regarding collective dominance, the appellate court has ruled that a dominant firm refers to an 'individual and separate' business entity that dominates a relevant market in the form of a monopoly or oligopoly but not collective dominance of multiple business entities forming a monopoly over a relevant market under article 2(7) of the MRFTA (Seoul High Court Decision in Case No. 2001Nu15193, rendered on 27 May 2003). On appeal, the Korean Supreme Court did not rule on the issue of collective dominance and dismissed the KFTC's appeal, affirming the High Court's ruling (Supreme Court Decision in Case No. 2003Du6283, rendered on 9 December 2005).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Both suppliers and purchasers may qualify as market-dominant entities under the MRFTA. There is no difference in the legal applicability between suppliers and purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

A relevant market refers to a market in which any competitive relation exists or may exist by the subject, stage or geographical area (article 2(8) of the MRFTA). The approach of the agencies or courts is no different from their approach to a definition of the relevant market in merger control cases.

A relevant 'goods or services market' is defined by taking into account: (i) similarity of functions and uses of relevant goods or services; (ii) perception of buyers on substitutability and related business behaviour; (iii) perception of sellers on substitutability and related business behaviour; and (iv) the Korea Standard Industrial Classification promulgated by Statistics Korea (section II.1. of the Guidelines). In addition, a relevant 'geographical market' means the geographical area in which ordinary buyers or sellers may divert their purchase or sale when there is a small but significant and non-transitory increase or decrease in price only within the geographical area (section II.2. of the Guidelines).

A unique aspect of the MRFTA is the rebuttable presumption of market-share based dominance. Under article 4, market dominance is presumed if (i) the market share of one business entity is 50 per cent or more, or (ii) the combined market share of three or less business entities is 75 per cent or more, excluding a business entity with market share of 10 per cent or less. However, market dominance is not presumed for a business entity whose annual sales or purchases are less than 4 billion won. The presumption can be rebutted if a firm proves that it does not have dominant power to set a market price or output.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The legislation and case law follow an effects-based rule of reason approach, and no conduct is subject to a per se prohibition. To constitute the abuse of market-dominant position, there must be intent or purpose to restrict competition in a relevant market, thereby artificially influencing the free market system, and the existence of potentially abusive acts raising competitive concerns must also be objectively proven (Supreme Court Decision in Case No. 2002Du8626, rendered on 22 November 2007, the *Posco* case). This case, based on an effects-based approach, provides crucial guidance for the KFTC and courts in assessing the abuse of market-dominant position.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The abuse of market dominance under the MRFTA includes both exploitative abuse and exclusive abuse. Under article 3-2(1), the exploitative abuse includes abusive practices of pricing, output control, and reduction of consumer welfare, while the exclusive abuse includes practices of interfering with other businesses, interfering with new competitors' entry to the relevant market and excluding competitors. However, the KFTC focuses more on the exclusionary abuse than the exploitative abuse in its regulation of dominance.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

A causal relationship is required between dominance and abuse.

In addition, the KFTC and Supreme Court acknowledge the concept of leverage. The Supreme Court held that if a dominant firm of a relevant market unfairly interferes with the business activities of other firms in an adjacent market by leveraging its dominance in the relevant market, such abusive interference can constitute the abuse of market-dominant position in the adjacent market (Supreme Court Decision in Case No. 2008Du1832, rendered on 13 October 2011).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Pursuant to the Supreme Courts' assessment on unreasonableness in the *Posco* case, the accused firm can raise a defence that it did not have intent or purpose to maintain or enhance monopoly power in a relevant market– the subjective element – or the concerned act does not raise competitive concerns – the objective element.

Even though exclusionary intent was shown, the firm can still raise the defences such as the unlikelihood or non-existence of anticompetitive effect based on the efficiency gains theory. In many cases, an economic research report analysing potential anticompetitive effect in a relevant market by an economist is used to provide an empirical basis.

Specific forms of abuse

14 Rebate schemes

Unreasonable rebate schemes can be viewed as exclusion of competitors if transacting business with a dominant firm is conditioned upon a business counterpart's refusal to deal with the dominant firm's competitors (article 3-2(5) of the MRFTA; article 5(5) of the MRFTA Enforcement Decree). The MRFTA does not distinguish between retroactive and incremental rebates and decides on the issue of legality on a case-by-case basis. Analysis of anticompetitive effects from rebate schemes comprehensively considers an increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' operating cost (section IV.6. of the Guidelines).

In the *Qualcomm I* case, the company offered retroactive rebates to Korean mobile handset manufacturers to which Qualcomm provided its modem chipsets, seeking foreclosure of Qualcomm's competitors. The KFTC viewed the retroactive rebate as the abuse of market-dominant position by Qualcomm and imposed a corrective measure and an administrative fine of approximately 273.2 billion won. (KFTC Decision 2009-281, 30 December 2009; 2013Du14726 case pending in Supreme Court).

Also in the *Intel* case, the company provided retroactive rebates to Korean PC makers, contingent upon their not purchasing CPUs from Intel's competitors. The KFTC also viewed the Intel's retroactive rebates as the abuse of a market-dominant position and imposed a corrective measure and an administrative fine of approximately 26.6 billion won (KFTC Decision 2008-295, 5 November 2008).

15 Tying and bundling

Tying may constitute the act of unreasonably interfering with business activities or doing considerable harm to the interests of consumers. The analysis of anticompetitive effects from tying comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and a rise in competitors' costs (section IV.6. of the Guidelines).

In the *Microsoft* case, Microsoft tied its Windows server and Windows Media Service, and its Windows PC operating system and Windows media player. The KFTC acknowledged such conduct by Microsoft as an act of unreasonably interfering with business activities or doing considerable harm to the interests of consumers and, thus, imposed a corrective measure and an administrative fine of approximately 3.25 billion won (KFTC Decision 2006-042, 24 February 2006, affirmed).

In addition, in another case, the KFTC initiated its investigation of Oracle on grounds that it allegedly abused its market dominance and superior trading position by providing its tied products – Data Base Management System (DBMS) support service and next DBMS version – and forcing its customers to purchase unnecessary DBMS support service for all licensed products. However, in April 2016, following full hearings before the KFTC, it found that Oracle had not violated the MRFTA on the grounds that, among others, Oracle's policy is a legitimate exercise of its IP right, and there is no anticompetitive effect, such as foreclosure, resulting from the Oracle's support policy.

16 Exclusive dealing

Exclusive dealing can be sanctioned for unfair interference with competitors' market entry and exclusion of competitors (article 3-2(4), (5) of the MRFTA; article 5(4), (5) of the MRFTA Enforcement Rules). The analysis of anticompetitive effects from exclusive dealing comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and a rise in competitors' cost (section IV.6. of the Guidelines).

In the *Nong-hyup* case, where the National Agricultural Cooperative Federation's demand on fertiliser producers for exclusive dealing of fertiliser for food crops was at issue, the KFTC acknowledged the demand for exclusive dealing as 'engaging in business to unfairly exclude competitors'. The Supreme Court also upheld the KFTC's conclusion (Supreme Court Case in Case No. 2007Du22078, rendered on 9 July 2009).

17 Predatory pricing

Supplying goods or services at a lower price than the comparable price in the ordinary course of business can raise competitive concerns for competitor exclusion, and it can be sanctioned as an unfair practice that excludes competitors under article 3-2(1)5 of the MRFTA. To determine 'unfairly low price,' the difference between the normal trading price, quantity and period of supply or purchase, characteristics, demand and supply status of the goods and services is considered (section IV. 5 of the Guidelines). Recoupment is not required.

The KFTC held that LG U-Plus and KT, both of which are key mobile network providers with a market-dominant position, excessively lowered the prices of their corporate messaging services below the normal trading price, thereby forcing out smaller competitors without their own mobile networks, and the KFTC issued a corrective measure and an administrative fine of approximately 6.5 billion won. (KFTC Decision 2015-49, 50, 23 February 2015). The normal trading price is presumed to be higher than the production cost of corporate messaging service providers without their own mobile networks – which is the addition of the messaging service fee which they pay to mobile network providers, labour costs, sales management costs and other related expenses for provision of the service. KT appealed the KFTC's disposition and filed a suit in the Seoul High Court, where the case is currently pending.

18 Price or margin squeezes

Price or margin squeeze can also be sanctioned as an unfair practice to exclude competitors under article 3-2(1)5 of the MRFTA. The case explained in question 17 also included an issue of margin squeeze. The KFTC viewed that it is commercially reasonable to presume that the normal trading price be set at a higher level than the production cost of the corporate messaging service providers.

19 Refusals to deal and denied access to essential facilities

Unfairly denying, interrupting or limiting access to the use of elements indispensable for other business entities to produce, supply and market their goods or services without justifiable grounds will be prohibited as 'an unfair practice to obstruct business activities of other business entities' (article 3-2(1)3 of the MRFTA; article 5(3)3, 4 of the MRFTA Enforcement Decree).

The MRFTA uses the term 'essential element' instead of 'essential facility' in the context of refusal to deal. The 'essential element' refers to both tangible and non-tangible elements, such as networks and key facilities, that are indispensable for business entities to produce, supply, and market their goods and services. The analysis for assessing anticompetitive effect comprehensively considers an increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs (section IV.6. of the Guidelines).

In *Posco,* the company's refusal to deal with Hyundai Hysco was at issue. Despite repeated requests made by Hyundai Hysco from August 1997 to February 2001 for supplying hot-rolled coils for cold-rolled plate, Posco rejected such requests for shortage of supply. The KFTC determined that such refusal by Posco constituted abuse of a market-dominant position and imposed a corrective measure and an administrative fine. Posco appealed and, the Supreme Court invalidated the KFTC's disposition, holding that there is no competitive concern arising from the refusal to deal by Posco (Supreme Court Case in Case No. 2002Du826, rendered on 22 November 2007).

20 Predatory product design or a failure to disclose new technology

Predatory product design or a failure to disclose new technology can be regarded as unfair interference with new market entries of competitors or refusal to deal and denial of access to essential elements (article 3-2(1)3, 4 of the MRFTA). The analysis of anticompetitive effect from predatory pricing comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs(section IV.6. of the Guidelines).

21 Price discrimination

The MRFTA provides that conduct that 'hinders operations of other businesses by providing conditions deemed unreasonable compared with normal business practices or providing discriminating price or transactional conditions' is abusive (article 3-2(1)3 of the MRFTA). The analysis of anticompetitive effect from price discrimination comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs (section IV.6. of the Guidelines).

In the *Qualcomm I* case, the KFTC imposed a corrective measure and an administrative fine based on its decision that Qualcomm unreasonably hindered the business operation of other companies by imposing a discriminatory royalty (KFTC Decision 2009-281, 30 December 2009; a case pending in the Supreme Court).

22 Exploitative prices or terms of supply

A significant increase or slight decrease in price of goods or services relative to change in supply and demand or change in the costs of supply without any justifiable reason is considered as unfairly determining, maintaining, or changing the price of goods or services and thus prohibited (article 3-2(1)1 of the MRFTA). Unreasonable control over an output is also prohibited (article 3-2(1)2 of the MRFTA). The standard of review for assessing anticompetitive effect comprehensively considers increase in price, decrease in output, restriction on diversity of goods and services, impediment to innovation and rise in competitors' costs (section IV.6. of the Guidelines).

In the *Shindongbang* case, a soybean oil producer, Shindongbang, announced a price increase of oil following a hike in the exchange rate and reduced its production a few days before the announced price increase. The KFTC found that the producer did not have a sound business reason for the reduction in output, and the turnover greatly increased, suggesting unreasonable output control. The Supreme Court agreed with the KFTC's interpretation (Supreme Court in Case No. 99Du10964 rendered on 3 November 1999).

23 Abuse of administrative or government process

Abusing a patent infringement action, patent invalidation action, and other related judicial or administrative procedures are perceived as the abuse of market-dominant position and thus prohibited (article 3-2(1)3 of the MRFTA). The IP Guidelines prescribe that the enforcement of patent rights through a lawsuit is highly likely to be determined as an abusive act in the following cases:

- filing a patent infringement lawsuit based on a patent deceptively obtained despite the awareness that the relevant patent has been obtained in a deceptive manner;
- filing a patent infringement lawsuit despite awareness of the patent holder that patent infringement will not be established (because the relevant patent has been nullified, etc); or
- filing a patent infringement lawsuit despite that the lawsuit is objectively baseless in the sense that no reasonable litigant could realistically expect (in terms of social norms or customary practices in a relevant market) success on the merits.

24 Mergers and acquisitions as exclusionary practices

The KFTC has never applied article 3-2 of the MRFTA to any merger or acquisition.

25 Other abuses

Other types of abuse, as long as they fall under the category of acts prescribed in article 3-2 of the MRFTA and article 5 of the Enforcement Decree of the MRFTA, can also be prohibited as abusive acts. In particular, the act of 'doing considerable harm to the interests of consumers' provided under article 3-2(1)5 can be interpreted to encompass a wide range of acts.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The KFTC is responsible for enforcement against abusive acts. For such enforcement purposes, article 50 of the MRFTA stipulates that the KFTC may take the following measures:

- a summons to a hearing of the relevant parties, interested parties or witnesses to seek their opinions;
- the designation of an appraiser and entrustment of the appraisal;
- an issuance of an order to an enterpriser, an enterprisers' organisation or an executive or employee thereof for a report on the cost and business situation, for the presentation of other necessary materials or objects, or detention of presented materials or objects; or
- access to the office or place of business of the dominant firm or its organisations for an on-site investigation.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

When it has found that an act violates article 3-2, the KFTC may order the dominant firm to discontinue the act of violation, publish the fact that it is ordered to make correction thereof and take other measures necessary for correction (article 5 of the MRFTA); impose upon such firm a surcharge not exceeding an amount equivalent to 3 per cent. In this case, however, the KFTC's finding of a violation would not be a prerequisite to a private plaintiff's damages action. Of course, in that case, the private plaintiff itself will have to prove first that the accused abused its dominant position. When no turnover exists or when it is difficult to calculate the turnover, a penalty surcharge may be imposed by up to 1 billion won (article 6 of the MRFTA). The KFTC may seek to impose imprisonment for not more than three years or a fine not exceeding 200 million won by filing a complaint with the prosecution (article 71(1) and 66(1)(1) of the MRFTA).

There are no structural remedies available for the KFTC against abusive acts.

The highest fine ever imposed by the KFTC to date for abuse of dominance is 1.03 trillion won in the *Qualcomm* case of January 2017 (*Qualcomm II*) – a case pending before the Seoul High Court (see question 29).

Update and trends

No significant changes in the legislation or other measures are expected in the near future.

Under the MRFTA, the KFTC has exclusive authority to file a criminal complaint to the Prosecutor's Office in addition to issuing a remedial order and an administrative fine (articles 66 and 71 of the MRFTA). Currently, in practice, the KFTC does not file criminal complaints even for the serious abuse of market-dominant position. However, the issue of abolishing the KFTC's exclusive authority to file a criminal complaint is being actively discussed in the National Assembly. If the KFTC's exclusive authority to file a criminal complaint is abolished, then the abuse of market-dominant position can be subject to criminal prosecution even when the Prosecutor's Office initiates an independent criminal investigation or an injured party files a criminal a complaint against a dominant firm for the abuse of market-dominant position, all without the KFTC's criminal referral.

Also, the KFTC recently set up the Intellectual Property Monitoring Division, which will closely monitor (i) SEP abuse such as an injunction or patent ambush in violation of the FRAND commitment in the ICT sector; (ii) monopolistic behaviour in the aftermarket (secondary market such as components or spare parts for repair and maintenance, after-sales service), using intellectual property including patent or design rights; and (iii) any competition-restraining behaviour in new growth industries including IoT, big data and biotechnology.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The KFTC can impose sanctions directly without having to petition a court or other authority.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

According to the KFTC's 2015 Annual Statistics, the most recent year for which such official statistics are available, there have been five abuse of market-dominant position cases, where at least a KFTC warning was given. Since the implementation of the MRFTA on 1 April 1981, there were 93 issuances of KFTC corrective measures. In particular, of the 93 issuances, 43 corrective measures – 46 per cent of the total issuances – were issued for unfair interference with business activities of other companies pursuant to article 3-2(1)3 of the MRFTA (2015 KFTC Annual Statistics, page 5, 6, 48).

The length of proceedings may vary depending on cases.

The most recent high-profile dominance case is *Qualcomm II*. In January 2017, the KFTC imposed a corrective measure and an administrative fine of 1.03 trillion won for Qualcomm's alleged abuse of a market-dominant position and unfair trade practice in the modem chipset and Standard Essential Patents (SEP) licensing for mobile communication markets. The KFTC found that Qualcomm refused or limited licensing of its SEP to competing modem chipset makers and coerced mobile handset makers into unfair licensing agreements. Qualcomm appealed the KFTC administrative decision to the Seoul High Court seeking independent judicial review, where the case is currently pending.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Even if an act by a dominant company constitutes an abusive act of market-dominant position, the clause will not automatically be void or invalidated. The Seoul High Court has held that the validity of the clause must not be judged in an abstract manner based on uniform standards. Instead, the issues including purposes and nature of the applicable laws, the prohibited acts, the extent of violation and the possible confusion in case of invalidation of the clause must first be taken into account, reflecting the concept of justice, fairness or principle of good faith (Seoul High Court Decision in Case No. 94Ra186, rendered on 12 January 1995).

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

A private plaintiff cannot seek an injunctive relief but may only seek monetary damages under the MRFTA. With respect to private enforcement, any person that suffers damages arising out of an abusive act by a dominant firm may be entitled to claim damages pursuant to article 56 of the MRFTA. In this case, however, the KFTC's finding of a violation would not be a prerequisite to a private plaintiff's damages action. Of course, in that case, the private plaintiff itself will have to prove first that the accused abused its dominant position.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

According to article 56 of the MRFTA, for harm caused by antitrust violations including abuse of market dominance, the violator will be responsible for damages. As a general rule, an injured party bears the burden of proof regarding the existence and scope of the damage it allegedly suffered. Where it is extremely difficult for the party injured by antitrust violations to provide sufficient evidence on the amount of damages to be awarded, the court may determine the appropriate amount under its discretion (article 57 of the MRFTA).

In 2013, three civil actions were filed against Microsoft after the KFTC found that Microsoft had engaged in illegally tying. The allegedly injured party, the plaintiff, argued that illegal tying of Microsoft's operating system and instant messenger effectively shut down the plaintiff's instant messenger business. However, the Supreme Court dismissed the suit for failure to prove a causal relation between the tying and the alleged injury (Supreme Court Decision in Case No. 2012Da79446, rendered on 13 February 2013).

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The Seoul High Court has jurisdiction over challenges to the KFTC's administrative decisions (article 55 of the MRFTA). It reviews both the facts and the law. The Supreme Court has jurisdiction to hear appeals of decisions of the Seoul High Court.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Article 23(1) of the MRFTA prohibits unfair trade practices. A non-dominant company can also be sanctioned for an unfair trade practice. Proscribed unfair trade practices are as follows:

- unfairly refusing any transaction or discriminating against a certain business counterpart;
- unfairly coercing or inducing customers of competitors to deal with oneself;
- trading with a business counterpart by unfairly taking advantage of his or her position in trade; and
- trading under the terms and conditions that unfairly restrict business activities of a business counterpart or disrupting business activities of other companies.

According to KFTC practice, in many cases where a particular act constituted both the abuse of a market-dominant position and the unfair trade practice, all of the relevant regulations on both issues will be used in the review of legality. However, for issuance of corrective measures such as an administrative fine, regulations on the abuse of a market-dominant position will be applied.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The law of 23 October 2011 on competition (the 2011 Law), as amended, governs the behaviour of dominant firms. Article 5 of the 2011 Law prohibits one or more undertakings from abusing a dominant market position and basically mirrors article 102 of the Treaty on the Functioning of the European Union (TFEU).

The law of 5 December 2016 on certain rules governing actions for damages for competition law infringements (the 2016 Law) aims at improving the effectiveness of private enforcement as to infringements of European Union and national competition law and fine-tuning the interplay between private damages actions and public enforcement by the European Commission and national competition authorities.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The 2011 Law does not define dominance. The preparatory parliamentary documents expressly refer to the *Michelin* case (C-322/81 (1983 ECR 3503)) ruled by the European Court of Justice (the ECJ) where dominance is defined as:

> *[A] position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.*

The same position has been taken by the Competition Council (see question 26), which regularly refers in its decisions to the definition given by the ECJ and the Communication from the Commission regarding guidance on the Commission's enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the Commission's guidance on article 102 enforcement priorities).

In its decision 2016-FO-04 *Utopia* (see question 24), the Competition Council stated that three elements are taken into account when determining the market power of an undertaking, namely (i) market shares, (ii) potential impact of expansion by actual competitors or entry by potential competitors and (iii) countervailing buyer power. In the same decision, the Competition Council claimed that the undertaking in question holds a (quasi-) monopoly position characterising a 'superdominance', so that it has even greater responsibility towards the other market players not to adopt behaviours that affect the competitive structure of the market which is already affected by the presence of a (quasi-) monopoly.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

According to the preparatory parliamentary documents of the Law of 17 May 2004 on competition that has been repealed by the 2011 Law, although these documents are not legally binding, the underlying standard is almost identical to the standard applicable under article 102 TFEU, which is an economic one.

The economic object of Luxembourg competition law was further explained in the preparatory documents of the 2011 Law. In accordance with these documents, the object of the 2011 Law is the protection of competition as an instrument to achieve competitiveness, on both macro- and micro-economic levels. The decisions rendered by the Competition Council confirm the economic approach.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Competition law, in principle, applies to all economic sectors. However, certain sectors are regulated by specific rules under the supervision of a regulator that are complementary to competition law. The Luxembourg regulatory authority (ILR) is the regulatory body for:

- the postal sector (Law of 26 December 2012 on postal services);
- the electronic communications sector (Law of 27 February 2011 on the networks and services of electronic communications) (the ILR Law);
- the electricity sector (Law of 1 August 2007 on the organisation of the electricity market, as amended); and
- the gas sector (Law of 1 August 2007 on the organisation of the natural gas market, as amended).

One of the main functions of the ILR is to open the postal, electronic communications, gas and electricity markets to competition.

In accordance with article 76(2) of the ILR Law, the jurisdiction of the ILR should not interfere with that of the Luxembourg competition authorities, even though in practice such interference may occur. It should be noted that behaviour may be qualified as an abuse of a dominant position even though it had been approved by the ILR (decision 2014-FO-07 – *Entreprise des Postes et Télécommunications*).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The 2011 Law applies to private entities, whether they be natural or legal persons, and to public entities. The determining criterion is whether an entity qualifies as an undertaking. In several decisions, the Competition Council expressly referred to the definition given by the ECJ in the *Höfner* case of 23 April 1991 according to which the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and its financing modus.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Since article 5 of the 2011 Law mirrors article 102 TFEU, only the abuse of a dominant position by one or several undertakings is prohibited by the 2011 Law. The 2011 Law does not cover the conduct of non-dominant companies attempting to become dominant.

7 Collective dominance

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

The 2011 Law prohibits, as does article 102 TFEU, 'any abuse by one or more undertakings of a dominant position'. Consequently, the 2011 Law covers collective dominance. The definition used by the Competition Council to define a collective dominant position and to set the conditions that must be fulfilled are therefore identical to those found in EU law (ECJ, judgment of 6 June 2002 *Air Tours*, T-342/99) (decision 2007-FO-03).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The 2011 Law does not differentiate between dominant purchasers and dominant suppliers, so it applies equally to both dominant suppliers and dominant purchasers. Owing to the absence of any decision of the Competition Council on this matter, an opinion cannot be expressed on whether there would be a difference of application of the 2011 Law to dominant suppliers and dominant purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The Competition Council regularly refers to the methodology used in EU law and in particular to the Commission notice on the definition of the relevant market.

With respect to the relevant product market, it results from the Competition Council's decision-making practice that the determining concept is substitutability, both of demand and supply. Regarding the geographic market, the Competition Council regularly makes reference to the concept of homogeneity as defined in the Commission's notice on the definition of the relevant market.

The 2011 Law does not define a market-share threshold at which an undertaking will be presumed to be dominant. In its *Utopia* decision, the Competition Council considered that a market share above 70 per cent will lead, unless there are exceptional circumstances, to a rebuttable presumption of dominance.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The abuse of a dominant position is not defined by the 2011 Law, but it does provide a non-exhaustive list of examples that mirrors the list in article 102 TFEU. Abuse may consist of:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making 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.

In its *Tanklux* decision 2009-FO-02, the Competition Council stated that the object and the effect of the practice in question (the introduction of provisions on the choice of the transport undertaking in storage agreements by a company in a monopolistic situation on the storage market) was to foreclose the transport market and to prevent other undertakings from entering into this market and that such a foreclosure had, at least, potential negative effects on consumers. The Competition Council then concluded that the practice was an abuse of dominant position on the basis that the anticompetitive object of the practice was characterised by the fact that such practice was of such a nature as to prevent oil companies from using other transport undertakings and to prevent other undertakings from entering into the transport market. The Competition Council seemed to apply both approaches by referring to the object of the relevant practice and to its effect.

The Competition Council stated in its *Utopia* decision (see question 24) that an abuse of dominance must produce anticompetitive effects that cause prejudice to the consumers.

In its decision 2014-FO-07 (*Entreprise des Postes et Télécommunications,* see question 15), the Competition Council also adopted an effect-based approach by analysing whether the practices in question had anticompetitive effects on the market. During the subsequent proceedings before the administrative tribunal, the Competition Council argued, however, that fidelity rebates that have effects similar to exclusive dealing agreements constitute a per se violation of article 102 TFEU and article 5 of the 2011 Law. In its judgment of 21 November 2016, the administrative tribunal rejected the approach based on a per se violation and ruled that there should be a concrete assessment of foreclosure effects. An appeal against this judgment may be lodged with the administrative court.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers exploitative practices (eg, unfair prices) and exclusionary practices (eg, refusal to supply, tying).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Given that the 2011 Law mirrors article 102 TFEU, the assessment is the same as under EU law, so that the existence of a dominant position is a necessary condition for the application of article 5 of the 2011 Law. However, there does not need to be a causal link between the dominant position and the conduct in question. Furthermore, dominance, the abuse thereof by one or several undertakings and the effects of the abuse must not necessarily occur in the same market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The 2011 Law does not provide for any defences. As article 5 of the 2011 Law mirrors article 102 TFEU, the Competition Council in principle follows the approach adopted in EU law.

In its 2007-FO-01 *Tanklux* decision relating to a refusal to grant access to heating fuel storage facilities, the Competition Council considered that the refusal by a dominant undertaking to enter into commercial relations with another undertaking may be considered as a form of abuse of dominant position in the absence of any objective justification for such refusal. In this case, the absence of additional storage capacities was accepted as a valid defence by the Competition Council.

In its *Tanklux* decision 2009-FO-02 on an alleged abuse of dominance on the market for transport of petroleum products, the Competition Council expressly referred to the Commission's guidance on article 102 enforcement priorities. The Competition Council recognised that the practice in question was legitimate, produced efficiency gains (even if limited) and guaranteed and improved the national supply of oil in terms of security and reliability. The Competition Council

concluded on these grounds that the behaviour of the company was justified and decided to close the file.

The question of economic efficiencies and objective justifications was also addressed by the Competition Council in the decision 2010-FO-02 *Coditel* (see question 15). Nevertheless, the Competition Council decided that the mitigating factors raised by the undertaking did not objectively justify the practices of tying and exploitative prices. Therefore it determined that the undertaking had committed an abuse of its dominant position.

In its *Utopia* decision by which it decided that the acquisition of a competitor may constitute an abuse of dominance, the Competition Council applied the 'failing firm' defence set out in the Commission's horizontal merger guidelines and considered that the acquisition did not have anticompetitive effects on the market. Furthermore, the Competition Council considered that the acquisition was in line with the objectives of the TFEU, by stressing in particular the fact that the acquisition helped to maintain jobs. However, this factor seems only to be permissible with regard to mergers.

To our knowledge, the Competition Council has not yet expressly taken a position on the question whether it would accept defences if exclusionary intent is shown.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may constitute an abuse of dominance under article 5 of the 2011 Law. In 2013, the Competition Council ruled on a case that dealt with an alleged abuse of dominant position related to retroactive fidelity rebates and other financial incentives granted by Luxair, the Luxembourg national airlines, in favour of travel intermediaries. In this case, the Competition Council decided not to analyse the practices as no dominant position was found (2013-FO-04, *Luxair*).

15 Tying and bundling

Tying and bundling are caught by article 5 of the 2011 Law. In the *Coditel* decision 2010-FO-02, a cable-TV operator was found to have abused its dominant position in the market by, inter alia, using tying practices. The operator had organised tying contractual arrangements whereby the consumer was only entitled to obtain the cable-TV subscription (the tying service) if he or she also agreed to subscribe to other tied products and services. In practice, the subscribers had to purchase a decoder commercialised by Coditel (the set-top box, the tied product), without having the choice to purchase a decoder from a competitor. Further, the operator deliberately restricted the subscribers' choice in offering them a few types of decoders containing some technical functions that not all of the operator's subscribers wanted to have, whereas a decoder without these technical functions did exist but was deliberately not offered by the operator to its subscribers.

In its *Entreprise des Postes et Télécommunications* decision 2014-FO-07, the Competition Council stated that bundled discounts (ie, discounts that only apply if the customer purchases all the services or products making up the offer) may be regarded as loyalty rebates because they may have the same restrictive effects on competition. The Competition Council came to the conclusion that the bundled discount in question is an exclusionary practice as it was an incentive for customers to exclusively purchase from the dominant undertaking. The decision was challenged before the administrative tribunal, which issued a ruling on 21 November 2016 annulling the Competition Council's decision. The judges considered, inter alia, that bundled discounts cannot be assimilated with loyalty rebates or exclusive agreements and that bundled discounts rather constitute a mixed bundling, also called multi-product rebate. Hence, the Competition Council applied, in the judges' view, the wrong methodology when assessing whether there is an abuse of dominance. An appeal against this judgment may be lodged with the administrative court.

In the case of decision 2015-RP-04 *B&J Engineering v BMW*, the plaintiff claimed that a car manufacturer had organised tying practices by selling its cars with an integrated board computer. The Competition Council found that the car manufacturer was not in a dominant position but also stressed that such practice cannot be considered as tying because there are no separate markets, neither for cars without board computers nor for board computers that are not integrated in a car.

Most recently, the Competition Council acknowledged that a tying practice consisting of renting out a performance venue together with auxiliary services (security, cleaning, sale of food and beverages, etc) seems justified, considering that, without the auxiliary services, the renting out of the performance venue would be an activity generating losses (2016-FO-02 *Rockhal*).

16 Exclusive dealing

Under Luxembourg law, exclusive dealing may amount to an abuse of dominance. In 2012, the Competition Council rendered a commitment decision that dealt, inter alia, with territorial exclusivity in favour of a press supplier that was dominant in the relevant market of press distribution. In the statement of objections, the designated adviser reached the preliminary conclusion that the contractual clause contained in the distribution agreement entered into with the retailers was likely to constitute an abuse of dominant position within the meaning of article 102 TFEU and article 5 of the 2011 Law. The undertaking proposed several commitments addressing the concerns raised by the plaintiffs and the statement of objections, so that a commitment decision was rendered by the Competition Council on 23 November (2012-E-04 *Valora*).

In its *Entreprise des Postes et Télécommunications* decision 2014-FO-07, the Competition Council set out that bundled discounts may have effects similar to exclusive dealing agreements insofar as they incite customers to purchase exclusively from the dominant undertaking. This decision was annulled by the administrative tribunal (see question 15).

In 2015, the Competition Council accepted commitments offered by a TV operator to modify its clauses contained in a contract concluded with the Luxembourg Basketball Federation (2015-RP-03 *Simba Pro v CLT-UFA)*. The TV operator agreed that its exclusive broadcasting rights shall not prohibit the transmission of sport events by another undertaking the following day of the transmission.

17 Predatory pricing

Predatory pricing may constitute an abuse of dominance under Luxembourg law. In its decision 2013-RP-02 *Entreprise des Postes et Télécommunications*, the Competition Council dealt with predatory prices in the internet service providers sector. Following a complaint lodged by an undertaking operating in the market, the Competition Council analysed whether the prices offered by the internet service provider in question could be qualified as predatory, namely, whether they were so low that other firms competing in the relevant market were not able to compete and were thus forced to leave the market. The Competition Council considered that the relevant concept for cost analysis for network industries was the 'Long Run Incremental Cost'. It follows from this decision that recoupment does not seem to be a necessary element for the Competition Council but may, however, be taken into account in case predation does not unambiguously result from the cost analysis.

Most recently, the Competition Council dealt with a case where the plaintiff claimed that an undertaking applied predatory prices for industrial laundry services (2016-RP-08 *Forum pour l'Emploi)*. The Competition Council analysed whether the allegedly dominant undertaking systematically applied prices that are below average variable costs by using the 'as-efficient-competitor test'. The Competition Council applies average variable cost as the benchmark.

18 Price or margin squeezes

Price or margin squeezing are covered by article 5 of the 2011 Law. The Competition Council's *Entreprise des Postes et Télécommunications* decision 2014-FO-07 dealt, inter alia, with margin squeezing. The plaintiff claimed that a telecommunications service provider abused its dominant position by leaving an insufficient margin between the wholesale and the retail rates applied to telephone subscriptions. This grievance was, however, rejected by the Competition Council because there was no proof that the wholesale rate resulted in a margin squeeze.

19 Refusals to deal and denied access to essential facilities

In its very first decision (2007-FO-01 *Tanklux*), the Competition Council confirmed that the refusal by a dominant undertaking to enter into commercial relations with another undertaking may be considered as a form of abuse of dominant position in the absence of any objective justification for such refusal.

The refusal to grant access to essential facilities may also be a form of abuse of dominant position. The conditions set forth by the

Update and trends

In November 2016, the Luxembourg parliament adopted the law on certain rules governing actions for damages for competition law infringements, amending the 2011 Law and implementing Directive 2014/104/EU of 26 November 2014 on antitrust damages actions. It will be interesting to see whether the 2016 Law will encourage undertakings and consumers harmed by abusive practices to take legal action in order to obtain damages.

Furthermore, it is likely that the Competition Council will appeal the administrative tribunal's judgment of 21 November 2016 annulling its decision 2014-FO-07 by which the Competition Council imposed a fine of €2.52 million on a telecommunications operator. A judgment of the highest administrative court would probably clarify many questions raised by the ruling of the administrative tribunal and help to build Luxembourg competition law.

Finally, the decision 2016-FO-04 by which the Competition Council used the provisions prohibiting the abuse of dominance to challenge an acquisition that was already completed raised once more the question whether or not it would be appropriate to introduce a specific merger control regime at national level. During the parliamentary debate preceding the adoption of the 2016 Law, the Minister of the Economy stated that he does not intent to introduce an ex ante merger control.

Competition Council as regards access to essential facilities are identical to those used in EU law.

20 Predatory product design or a failure to disclose new technology

The Competition Council has not yet rendered a decision on this issue.

21 Price discrimination

Price discrimination is expressly referred to in article 5 of the 2011 Law by giving as an example of abuse: applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

In its *POST Telecom* decision 2014-E-05, the Competition Council reached the preliminary conclusion that a mobile provider was likely to have committed an abuse of dominant position by applying discriminatory prices in favour of existing clients (discrimination between calls made within the provider's network and calls made to other providers), which led to network effects. The Competition Council finally rendered a decision in which it accepted the commitments offered by the provider.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply may constitute an abuse of dominance. In the *Coditel* decision 2010-FO-02, a company operating on the cable-TV distribution market was found to have abused its dominant position for, inter alia, having charged exploitative prices to consumers (the company had charged an unjustified subscription fee). The Competition Council concluded that the billing practices were anticompetitive and, therefore, constituted an abuse of dominant position.

The concept of exploitative prices was further recalled by the Competition Council's *Editus* decision 2014-RP-01. In this case, a complaint was lodged for alleged exploitative prices charged by a leading undertaking operating in the publishing sector. After an analysis of the prices charged by the undertaking, the Competition Council considered that in order to qualify the concerned pricing practices as exploitative, the costs actually incurred by the undertaking and the price actually charged for the service rendered must be excessive. Since such evidence was not found, the Competition Council dropped the case.

In the case having led to the *Rockhal* decision 2016-FO-02, the Competition Council also examined whether the dominant undertaking charged excessive prices for the renting out of a performance venue but came to the conclusion that this was not the case in view of the costs to be borne by the undertaking.

23 Abuse of administrative or government process

The Competition Council has not yet rendered a decision on this issue.

24 Mergers and acquisitions as exclusionary practices

In the absence of a specific merger control regime under national law, mergers and acquisitions are caught by article 102 TFEU and article 5 of the 2011 Law. According to the Competition Council's *Utopia* decision, the EU Merger Regulation does not reduce the scope of article 102 TFEU or of article 5 of the 2011 Law. In this decision, the Competition Council stressed its authority to exercise an ex post control of mergers which strengthen a dominant position by using, in the absence of a specific merger control regime at national level, the provisions prohibiting the abuse of a dominant position. On the basis of the judgment of the ECJ in *Continental Can*, the Competition Council stated that the acquisition of a competitor may constitute an abuse of a dominant position if it affects the structure of the market to such an extent that the dominant undertaking faces no competitive pressure from its remaining competitors as they do not represent a real counterweight. The Competition Council applied the 'failing firm defence' and closed the case without further action on the grounds that the acquisition did not have anticompetitive effects.

25 Other abuses

No specific abuses are excluded by the 2011 Law.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Competition Council, an independent administrative authority composed of four members, is responsible for enforcement of article 5 of the 2011 Law and article 102 TFEU. The members of the Competition Council are assisted by investigators in the performance of their duties.

The Competition Council can issue requests for information, interview natural or legal persons and conduct inspections as well as dawn raids. Failure to comply with a request for information made by decision pursuant to article 14(2) of the 2011 Law may lead to a fine of up to 5 per cent of the total turnover of the last financial year. The Competition Council may also impose periodic penalty payments per day of noncompliance of up to 5 per cent of the daily turnover of the last financial year.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

If an abuse of dominant position by one or several undertakings has been ascertained, the Competition Council may order the undertaking to stop the conduct by imposing any coercive measures proportionate to the infringement committed and necessary to stop the infringement. Given that the 2011 Law does not expressly provide for structural remedies, it is unclear whether the Competition Council has the power to impose such remedies. From our practice, it appears that the measures proposed by the Competition Council are in principle complied with by firms.

In case the practice could cause irreparable harm to public economic public policy or to the plaintiff, the Chairman of the Competition Council may also award interim injunctions and impose periodic penalty payments in order to compel the undertaking to comply with the interim injunction.

Pursuant to article 20(2) of the 2011 Law, the Competition Council may fine undertakings that are in breach of the 2011 Law or of article 102 TFEU. The amounts of the fines are to be fixed on a case-by-case basis and will depend, inter alia, on the duration and the gravity of the infringement. The maximum fine shall not exceed 10 per cent of the highest worldwide turnover (excluding taxes) that has been realised during the latest full financial year preceding the year during which the anticompetitive practices have been committed. In the case of consolidated accounts, the turnover to be considered is the turnover stated in the consolidated accounts of the mother company.

In 2014, the Competition Council imposed a fine of €2.52 million on a telecommunications service provider for abuse of dominance. This decision was, however, annulled by the administrative tribunal. This judgment remains subject to appeal before the administrative court.

Pursuant to the 2011 Law, the fines and sanctions are imposed on the undertaking having committed the infringement. As undertakings, especially those with significant market power, are organised in the form of companies, individuals may not, in principle, be fined or sanctioned.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Competition Council may directly impose sanctions.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In 2015 and 2016, the Competition Council rendered eight decisions regarding allegations of abuse of dominance. The Competition Council either dismissed the cases without further action or accepted the commitments offered by the undertaking.

The length of dominance proceedings vary considerably, depending on the complexity of the case. A decision of the Competition Council may be rendered within less than a year from the referral of the case to the Competition Council but it may also take several years.

In the case having led to the *Entreprise des Postes et Télécommunications* decision 2014-FO-07, it took more than seven years from the filing of the complaint to the decision by which the Competition Council imposed a fine of €2.52 million. This is the highest fine ever imposed by the Competition Council for an abuse of dominance. In its ruling of 21 November 2016, the administrative tribunal stressed that the proceedings exceeded a reasonable period and annulled the Competition Council's decision for several procedural and substantive reasons. An appeal against this judgment may be lodged with the administrative court.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The 2011 Law does not contain provisions concerning the consequences of infringements of article 5 of the 2011 Law or article 102 TFEU on the validity of contractual clauses. In principle, a clause that constitutes an abuse of dominance is void. In this case, the courts would consider the entire contract void only if the relevant clause is not separable from the surplus of the contract.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The 2011 law does not contain provisions on private enforcement, so that the ordinary courts are competent for the private enforcement of competition rules. Only courts have jurisdiction to invalidate a provision or contract and to grant damages. In this respect, the 2016 Law contains provisions aiming at facilitating actions for damages through the introduction of specific procedural rules before the court. The claimant may also seek interim relief before the summary judge in order to put an end to a prima facie unlawful situation if: (i) the claim is urgent; (ii) the order is sought to avert a situation which would cause irreparable harm to the plaintiff; or (iii) the order is sought to remedy an unlawful situation which has already occurred.

In accordance with article 11 of the 2011 Law, the Competition Council may impose any remedy on an undertaking that has abused its dominant position that is proportional to the infringement and necessary to stop the infringement. Consequently, the Competition Council may, for example, grant access to essential facilities to a competitor of the dominant undertaking or order the dominant undertaking to supply goods and services.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices have a claim before civil and commercial courts pursuant to Luxembourg tort law. Hence, the claimant will need to prove a fault, damage and a causal link between the two. The 2016 Law implementing Directive 2014/104/EU of 26 November 2014 on antitrust damages actions aims, however, at facilitating actions for damages and introduces a set of presumptions with respect to the existence of an infringement of competition law and its effects.

To our knowledge, Luxembourg courts have not yet ruled on actions for damages for abuse of dominance.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Decisions of the Competition Council finding an abuse may be challenged before the administrative tribunal. An appeal against the judgement of the administrative tribunal may be lodged with the administrative court. Both the administrative tribunal and the administrative court review the facts and the law.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

The 2011 Law does not provide for any rules applying to the unilateral conduct of non-dominant firms. Article 5 of the 2011 Law mirrors article 102 TFEU, so that Luxembourg law relating to the unilateral conduct of undertakings is as strict as article 102 TFEU.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The behaviour of dominant firms in Malaysia is regulated by the Competition Act 2010 (Competition Act). Section 10 of the Competition Act (Chapter 2 prohibition) prohibits an enterprise, whether independently or collectively, from engaging in any conduct that amounts to an abuse of its dominant position in any market for goods or services. The Competition Act governs the behaviour of dominant firms for all markets in Malaysia, except for specific sectoral activities which have been excluded under the Competition Act such as the networked communications and broadcast sectors, which are governed under the Communications and Multimedia Act 1998 (Communications and Multimedia Act) and enforced by the Malaysian Communications and Multimedia Commission (MCMC), the energy sector which is governed under the Energy Commission Act 2001 and enforced by the Energy Commission, as well as the aviation sector which is governed under the Malaysian Aviation Commission Act 2015 which came into force on 1 March 2016 (Malaysian Aviation Commission Act) and enforced by the Malaysian Aviation Commission.

There has also been a further exclusion for upstream oil and gas activities, in the Petroleum Development Act 1974 and Petroleum Regulations 1974, as described in question 5.

In addition, although not expressly carved out from the application of the Competition Act, the Postal Services Act 2012 also introduced general competition law applicable to the postal market, which is also under the purview of MCMC.

The Competition Act is enforced by the Malaysia Competition Commission (MyCC). MyCC has issued its dominance guidelines (published on 26 July 2012) (MyCC Dominance Guidelines), which aim to offer guidance to businesses on the application of competition law with respect to the Chapter 2 prohibition.

MyCC notes that effective competition drives inefficient enterprises out of the market, and emphasises that the Competition Act protects competition and not competitors. As a result, it has incorporated the European concept that only competitors that are 'as efficient' as the dominant enterprise should benefit from the rules on exclusionary abuse and MyCC expressly states this in paragraphs 3.5 to 3.6 of the MyCC Dominance Guidelines.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Dominance is defined as a situation in which one or more enterprises possess such significant power in a market as to be able to adjust prices or outputs or trading terms without effective constraint from competitors or potential competitors. MyCC considers that the ability of an enterprise to price well above the competitive level for a sustained period or the ability to actually drive an equally efficient competitor out of business as evidence that the enterprise is dominant.

Other factors such as barriers to entry and countervailing buyer power may also be used in the assessment of dominance. Further information is set out in the MyCC Dominance Guidelines. The legislation and Guidelines do not expressly set out relative dominance and heightened market power.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The Competition Act, and by extension the Chapter 2 prohibition, has several related objects. It aims to promote economic development and protect the process of competition to encourage efficiency, innovation and entrepreneurship to promote competitive prices, better quality of products and services for the ultimate benefit of consumers.

Recognising the need for certain social or welfare activities, the Competition Act does not apply to any activity based on the principle of solidarity or to any enterprise entrusted with the operation of services of general economic interest.

4 Sectors-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The Competition Act introduces general competition law for all markets in Malaysia except those carved out for sector regulators. These exceptions are provided in the First Schedule to the Competition Act which include the Communications and Multimedia Act in relation to networked communications and broadcast sectors and the Energy Commission Act 2001 in relation to the energy sector. The First Schedule to the Competition Act also excludes any activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974 directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia. Although not expressly excluded in the Competition Act, the Postal Services Act 2012 also contains competition law provisions addressing abuse of dominance applicable to the postal market, which is under the purview of MCMC. The newly enacted Malaysian Aviation Commission Act, which is regulated by the Malaysian Aviation Commission, also prohibits abuse of dominance.

The Communications and Multimedia Act, regulated by MCMC, applies to networked communications but not the postal sector which is also regulated by MCMC under a separate legislation (ie, the Postal Services Act 2012). Under the Communications and Multimedia Act, where a licensee is determined to be in a dominant position by MCMC, it may be directed by MCMC to cease conduct that has the effect of substantially lessening competition in a communications market and to implement appropriate remedies. The communications sector is subject to economic regulation through licensing, the prohibition of anti-competitive conduct and frameworks on access.

MCMC's Guideline on Dominant Position (published on 24 September 2014 (MCMC Dominant Position Guideline)) outlines the general approach taken by MCMC in determining whether a licensee is in a dominant position in a communications market. MCMC will take a flexible approach when determining whether a licensee is dominant and this determination can be made at any time during the course of examining the licensee's conduct. The MCMC Dominant Position

Guideline states that MCMC will adopt a two-step approach when assessing dominance. MCMC will first define the boundaries of the relevant communications market and then determine whether the licensee is dominant in the relevant communications market.

MCMC's approach to market definition is similar to MyCC's in that it applies the concept of substitutability or the hypothetical monopolist test. When defining the relevant communications market for purposes of assessing dominance, MCMC will typically focus on the identification of the product and the geographical dimensions of the market. However, in certain situations, the nature of the communications market may require an additional consideration of time dimension (which refers to the time characteristics of the market, for example, cyclical patterns of demand or innovation or inter-generational products) and functional dimension. These additional dimensions may be considered separately or as part of the analysis of the relevant product dimension.

MCMC may determine the existence of a dominant position from a single factor or from a number of factors that are not of themselves determinative. When assessing whether a licensee is in a dominant position, MCMC will consider the following factors, which are not meant to be exhaustive:

- the structure of the market and the nature of competition in that market, including market shares;
- the barriers to entry and expansion;
- the countervailing power of buyers; and
- the nature and effectiveness of economic regulation (if any).

Apart from the MCMC Dominant Position Guideline, MCMC has issued the following guidelines:

- Market Definition Analysis (published on 24 September 2014); and
- Guideline on Substantial Lessening of Competition (published on 24 September 2014).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Dominance provisions apply to enterprises. 'Enterprise' is defined as any entity carrying on commercial activities relating to goods or services. This would include, for instance, companies, partnerships, businesses, trade associations, and state-owned corporations. The definition expressly recognises the concept of a single economic unit and, thus, includes parents with decisive influence and subsidiaries that do not enjoy real autonomy in determining their actions on the market.

The application of the Competition Act is determined by the nature of the activity, namely, whether it is commercial or not, rather than the kind of entity. Commercial activity has been defined to exclude any activity directly or indirectly in the exercise of government authority or activity conducted on the basis of solidarity. Thus, where a public body or a government-linked company engages in commercial activity, it will be subject to the Competition Act.

Anticipating issues arising from the European Court of Justice judgment in *Fenin* (11 July 2006), the Competition Act does not apply to any purchase of goods or services for non-economic activities. Thus, public sector procurement for the provision of goods and services on the basis of solidarity (such as public health services) or services of general economic interest will be excluded.

In a public consultation paper on proposed amendments to the Competition Act, MyCC has proposed to expressly describe the type of entity or person that falls under the scope of 'enterprise' (ie, an individual, a body corporate, an unincorporated body of persons or other entity). MyCC has also proposed to expand the scope of an enterprise's activities to which the Competition Act would apply, to cover not only enterprises that carry on commercial activities but also to economic activities.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The Chapter 2 prohibition only applies to dominant enterprises. Merely being in a dominant position is not prohibited as long as there is no abuse of such position.

Monopolising practices, where a non-dominant firm attains a dominant position through acquisition, are not caught by the Chapter 2 prohibition. The Competition Act does not have a merger control regime (only the Malaysian Aviation Commission Act has, merger control provisions) and, thus, the inorganic acquisition of another business to achieve a dominant position is not subject to regulation under the Competition Act. However, where there are concerns that a merger or acquisition may result in an infringement of the Competition Act, the parties to the transaction can either conduct a self assessment to ensure that the benefits to competition outweigh the detriments or apply for an individual exemption.

Collective dominance

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

Competition Act

The Chapter 2 prohibition applies to collective dominance. The MyCC Dominance Guidelines describe collective dominance as enterprises exercising significant market power together. MyCC will examine each case on the merits and determine whether two or more enterprises with significant market power act similarly in a market and that conduct excludes equally efficient competitors.

Communications and Multimedia Act

The Communications and Multimedia Act does not directly contemplate the existence of joint or collective dominance. However, MCMC may determine that a licensee is dominant in a communications market exhibiting oligopolistic characteristics.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The Chapter 2 prohibition applies to dominant purchasers. Section 10(2)(a) of the Competition Act provides that an abuse of dominant position may include, among other matters, the imposition of an unfair purchase price or other unfair trading condition on any supplier. Here, dominance is determined by reference to supply side substitutability, namely, suppliers switching to other buyers.

However, the purchase of goods and services for non-economic activities will not be considered to be economic and will fall outside the application of the Competition Act. For example, government procurement for public healthcare will not be subject to the Competition Act, as the provision of public healthcare is not an economic activity. See also question 5.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Market definition involves the identification of close substitutes for the product under investigation. Under the Competition Act, 'market' is defined as a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the original goods or services.

Similar to the MCMC's approach as outlined in question 4, MyCC applies the hypothetical monopolist test, which sees the relevant market as the smallest group of products (in a geographical area) that a hypothetical monopolist controlling that product group (in that area) could profitably sustain a price above the competitive price, namely, a price that is at least a small but significant amount above the competitive price, and MyCC will apply a price range of 5 to 10 per cent. This is further described in the Guidelines on Market Definition (published on 2 May 2012).

In dominance cases, it must be borne in mind that the prices charged by a dominant entity may already be raised above the competitive level, and adopting this approach results in a wider market definition that would otherwise have been the case if a competitive price was used (this is known as the Cellophane fallacy). However, understanding

the degree of substitution even at prevailing prices provides useful information about substitution and competitive constraints.

Competition Act

Section 10(4) of the Competition Act specifically provides that market share alone is not determinative of a dominant position.

Nonetheless, according to the MyCC Dominance Guidelines, MyCC will generally consider a market share that exceeds 60 per cent of the relevant market to be indicative of dominance. However, given the text of section 10(4), there may well be findings of dominance below this threshold. The MyCC Dominance Guidelines indicate, for example, that a new product with patented features may be considered dominant even though its market share is only 20 to 30 per cent of the market, but rapidly growing as consumers switch to this product.

Communications and Multimedia Act

In relation to the communications market, the MCMC Dominant Position Guideline states that in general, a 'high' market share will be considered to be a market share of more than 40 per cent in a communications market, however, this does not preclude a licensee with a market share of less than 40 per cent from being found to be dominant in a market if it is not subject to effective competitive constraints. When analysing market share data, the MCMC Dominant Position Guideline states that it will consider the current market share of the licensee against the market shares of its competitors in the relevant communications market and the changes in the licensee's market share over time.

MCMC, on 3 October 2014, made a determination of dominance (Commission Determination on Dominant Position in a Communications Market (Determination No. 1 of 2014)) that sets out MCMC's findings on which licensees are dominant. This determination was issued following a public inquiry.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The concept of abuse is not specifically defined in the Competition Act. However, section 10(2) of the Competition Act provides a non-exhaustive list of conduct that may constitute abuse of a dominant position:

- directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- limiting or controlling production, market outlets or market access, technical or technological development or investment, to the prejudice of consumers;
- refusing to supply to a particular enterprise or group or category of enterprises;
- discriminating by applying different conditions to equivalent transactions with other trading parties;
- forcing conditions in a contract that have no connection with the subject matter;
- predatory behaviour towards competitors; and
- buying up a scarce supply of resources where there is no reasonable commercial justification.

MyCC has indicated in its MyCC Dominance Guidelines that it will use an effects-based approach to assess exclusionary practices (see question 11).

The Competition Act does not prohibit a dominant enterprise from engaging in conduct that is a reasonable commercial response to market entry or conduct by a competitor.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes. The Chapter 2 prohibition covers both exploitative practices (eg, unfair prices or trading terms) and exclusionary conduct (eg, predatory conduct, refusal to supply or exclusive dealing).

According to the MyCC Dominance Guidelines, MyCC is only concerned with exploitative or excessive pricing if there is unlikely to be competition in the market to constrain the dominant enterprise (see question 22).

Exclusionary conduct is conduct that prevents equally efficient competitors from competing and will be assessed in terms of its effects on the competitive process and not its effects on competitors.

So, even if an enterprise is dominant it should not be stopped from engaging in competitive conduct that benefits consumers even if inefficient competitors are harmed. MyCC will use an effects-based approach as used elsewhere in assessing a potential abuse of a dominant position. By adopting this approach, MyCC shall ensure that conduct that benefits consumers will not be prohibited and therefore ensure that enterprises have the incentives to compete on merits. Adopting an effects-based approach ensures good economic outcome consistent with the aims of the Competition Act. In any event, it is very unlikely that dominant enterprises would not know the likely effect on competition from their actions.

In general, in assessing whether the effect of exclusionary conduct is an abuse or not, MyCC will use two main tests for assessing anticompetitive effects: first, whether the conduct adversely affects consumers and second, whether the conduct excludes a competitor that is just as efficient as the dominant enterprise.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In order to constitute an infringement of the Chapter 2 prohibition, the enterprise must be in a dominant position. There can be abuse even where there is no causal link between the dominant position and conduct in question. MyCC is likely to follow jurisprudence in other countries where it is not necessary that the dominant position, the abuse and the effects occur in the same market, as indicated in the MyCC Dominance Guidelines. For example, a dominant enterprise that sells an essential input to buyers in a downstream market refuses to supply those buyers when it establishes a subsidiary in the downstream market to compete with them. See also question 18.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In contrast to the Chapter 1 prohibition (similar to article 101 of the Treaty on the Functioning of the European Union), the Chapter 2 prohibition does not allow a defence based on efficiency gains. There is also no power to grant an exemption from abuse of dominance.

However, similar to the position in the EU, a dominant enterprise can protect its own commercial interest in the face of competition from existing competitors and new entrants. Section 10(3) of the Competition Act allows a dominant enterprise to take any step that has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor. For example, a dominant enterprise may meet a competitor's price even though the price may be below cost (in the short term).

Specific forms of abuse

14 Rebate schemes

Generally, rebates and discounts can be pro-competitive. However, where they are exclusionary, that is, where they are used to foreclose the market, they are prohibited.

Discounts related to costs may be justifiable. However, non-cost-related discounts can be structured to effectively lock in customers and make them unavailable to competitors. How much of the market is foreclosed will be a relevant factor for MyCC's consideration. As indicated above, MyCC will consider the anticompetitive effect of the scheme on the market.

15 Tying and bundling

Section 10(2)(e) of the Competition Act prohibits making the conclusion of a contract subject to acceptance by other parties of supplementary conditions, which by their nature or according to commercial usage have no connection with the subject matter of the contract.

MyCC will be concerned where a dominant enterprise is leveraging its dominance in one market to obtain market power in another market.

16 Exclusive dealing

Where the exclusive dealing, non-compete and single branding have exclusionary or foreclosing effects on the market, MyCC will consider this to infringe the Chapter 2 prohibition. Section 10(2)(b) of the Competition Act prohibits agreements that limit or control, inter alia, market outlets or market access to the prejudice of consumers.

17 Predatory pricing

Predatory behaviour is prohibited by section 10(2)(f) of the Competition Act, but this is not defined. The MyCC Dominance Guidelines describe this in terms of below-cost pricing designed to force a competitor out of the market. This is to be distinguished from genuine price competition in response to competitors and new entrants, which is a reasonable commercial response and, hence, permissible.

In determining whether a dominant enterprise is charging below cost, MyCC will consider whether the dominant enterprise's price is reasonable across the whole relevant output, and not merely the last unit of output. Several cost concepts are identified in the MyCC Dominance Guidelines, including average variable costs, average avoidable costs, long-run incremental costs and average total costs.

In the determination, MyCC will investigate whether a competitor that is as efficient as the dominant enterprise will be excluded from the market.

18 Price or margin squeezes

Price squeezes are not on the list of abuses in section 10(2) of the Competition Act, which is a non-exhaustive list. Price squeezing is likely to be considered as, effectively, a refusal to supply, which is discussed below.

Case law in the EU indicates that price squeezes are distinguishable from refusal to supply.

In April 2016, MyCC made a finding of non-infringement against Megasteel Sdn Bhd. The complainant alleged that Megasteel as the sole supplier of hot rolled coil, an essential material to produce cold rolled coil, is charging higher than the international price of hot rolled coil. The complainant also alleged that Megasteel is competing in the cold rolled coil market and often undercuts its price. In its proposed decision, MyCC stated that Megasteel had abused its dominant position by charging or imposing a price for its hot-rolled coil that amounts to a margin squeeze that has an actual or potential effect of constraining the ability of reasonably efficient competitors in the downstream market to earn a sufficient margin. However, in its final decision (after assessing submissions from Megasteel and further analysis), MyCC held that Megasteel did not infringe the Chapter 2 prohibition. MyCC held that owing to certain external factors the steel industry market is heavily distorted. Although Megasteel was the sole producer and supplier of hot-rolled coil, hot-rolled coil can be imported subject to certain conditions. Further, MyCC found that the downstream market has been liberalised and the competitors in the downstream market, including Megasteel are competing in the market with competitive selling prices.

In the communications sector, MCMC has determined mandatory standards for access and access pricing for certain facilities and services.

19 Refusals to deal and denied access to essential facilities

Section 10(2)(c) of the Competition Act lists refusal to supply to a particular enterprise or group of enterprises as an abuse of dominance. Although enterprises are generally free to deal with whomever they choose, a dominant enterprise's refusal to supply an essential input may constitute an abuse of dominance where it has an exclusionary effect.

The MyCC Dominance Guidelines cite the following examples:

- refusal to supply an essential input to a downstream buyer where the dominant enterprise also competes with that buyer in that downstream market;
- refusal to licence intellectual property rights; and
- refusal to grant access to infrastructure that is necessary or essential facility to a supply certain products.

Refusal to supply may, in some circumstances, be founded on reasonable commercial justification. For example, refusal to supply to a buyer who has not paid for past purchases or refusal to grant access to infrastructure where there is no spare capacity.

MyCC has indicated that the remedy for a refusal to supply is to require the supplier to supply at a reasonable consideration, taking into account the need to balance incentives to invest in innovation.

20 Predatory product design or a failure to disclose new technology

According to section 10(2)(b) of the Competition Act, limiting or controlling production, market outlets or market access, technical or technological development or investment to the prejudice of consumers can constitute abusive conduct.

As indicated in question 19, the MyCC Dominance Guidelines indicate that a refusal to license intellectual property rights may constitute an abuse of dominance.

21 Price discrimination

Section 10(2)(d) of the Competition Act prohibits the application of different conditions to equivalent transactions to an extent that may:

- discourage new market entry or expansion or investment by an existing competitor;
- force from the market or otherwise seriously damage an existing competitor that is no less efficient than the dominant enterprise; or
- harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market.

Price discrimination occurs where the same product is sold at different prices and such a price difference is unrelated to the cost of supplying the products. This includes selling the same product to different customers at different prices and selling the same product to the same customer at different prices.

Price discrimination can have adverse effects on consumers. For example, where the dominant enterprise charges a low price for a product where there is stiff competition and cross-subsidises the lower margins from areas where there is lack of competition and by this forces smaller enterprises out of the competitive market.

MyCC will examine price and other forms of discrimination on a case-by-case basis. MyCC acknowledges that price discrimination is not always abusive and can be beneficial in some instances. By charging more to groups who can better afford it, price discrimination can lead to higher output by charging less to lower income groups, which can be welfare-enhancing.

As indicated in question 13, discrimination can be commercially justified. For example, volume discounts can reflect savings and economies of scale and better prices may be offered for early payment.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply are regarded to be abusive by section 10(2)(a) of the Competition Act where a dominant enterprise directly or indirectly imposes an unfair purchase or selling price or other unfair trading condition on any supplier or customer.

Exploitative prices may result from structural conditions in the market. Where there are high barriers to entry, a dominant enterprise can command excessive profits. MyCC will only be concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market. In determining whether pricing is excessive, MyCC will consider the actual price against the costs of supply and other factors such as the profitability of the dominant enterprise.

23 Abuse of administrative or government process

The Competition Act and the MyCC Dominance Guidelines do not address this specific form of abuse. The general principles on exclusionary conduct apply (see question 11) as the Act and Guidelines do not purport to exhaustively list all forms of abuse.

24 Mergers and acquisitions as exclusionary practices

The Competition Act and the MyCC Dominance Guidelines do not address this specific form of abuse (see question 6). This, however, does not preclude the application of the general principles on exclusionary conduct (see question 11).

Update and trends

Although the scope of the amendments remains unclear, MyCC has proposed to review and amend the Competition Act and the Competition Commission Act 2010, which came into effect on 1 January 2012. The MCMC has also indicated that the Communications and Multimedia Act is being reviewed and amended; however, the amendments have yet to come into effect.

25 Other abuses

There is no exhaustive list of forms of conduct that may infringe the Chapter 2 prohibition.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Competition Act is enforced by MyCC, a body corporate established under the Competition Commission Act 2010, comprising representatives from both the public and private sectors. Competition law in the communications and broadcast sector is enforced by the MCMC, while the Malaysian Aviation Commission and the Energy Commission oversee competition in the aviation and energy sectors respectively.

MyCC officers have all of the powers of investigation and enforcement under the Competition Act. They have the power to require any person to produce documents and information and to conduct unannounced searches (dawn raids). In addition, the Competition Act declares that MyCC officers investigating the commission of an offence under the Competition Act shall have any or all of the powers of a police officer under the Criminal Procedure Code.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Upon finding an infringement of the Chapter 2 prohibition, MyCC:

- must require that the infringement cease immediately;
- may specify steps that are required to be taken by the infringing enterprise, which appear to MyCC to be appropriate for bringing the infringement to an end;
- may impose a financial penalty of up to 10 per cent of the enterprise's worldwide turnover over the period during which the infringement occurred; or
- may give any other direction it deems appropriate.

The highest fine imposed by MyCC thus far for infringement of the Chapter 2 prohibition is against MyEG Services Sdn Bhd (MyEG) where MyCC imposed a financial penalty of 2.27 million ringgit.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Competition Act empowers MyCC to impose sanctions directly on the infringing enterprise without petitioning a court or other authority. Similarly, the Malaysian Aviation Commission and the MCMC are empowered to impose sanctions directly on the infringing enterprise under the Malaysian Aviation Commission Act and the Communications and Multimedia Act respectively.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Since the Competition Act came into effect on 1 January 2012, there have been only two cases on abuse of dominance.

In November 2013, MyCC proposed a 4.5 million ringgit fine on Megasteel for abusing its dominant position. MyCC alleged that Megasteel's practice of charging or imposing a price for its hot-rolled coil is disproportionate to the artificially low selling price of its cold-rolled coil and amounts to a margin squeeze that has the effect of preventing competition in the downstream market, making it a serious breach of competition law. In determining the basic amount of the proposed fine, MyCC said that it took into account the nature of the product, the structure of the market, the market share of the enterprise, entry barriers and the effects of Megasteel's margin squeeze on its downstream competitors as well as the seriousness of the infringement. On 18 April 2016, MyCC finalised the decision and made a finding of non-infringement against Megasteel. In its final decision (after assessing submissions from Megasteel and further analysis), MyCC held that Megasteel did not infringe the Chapter 2 prohibition. MyCC held that due to certain external factors the steel industry market is heavily distorted. Although Megasteel was the sole producer and supplier of hot-rolled coil, hot-rolled coil can be imported subject to certain conditions. Further, MyCC found that the downstream market has been liberalised and the competitors in the downstream market, including Megasteel, are competing in the market with competitive selling prices.

On 6 October 2015, MyCC issued a proposed decision against MyEG Services Sdn Bhd (MyEG) stating that the company had abused its dominant position in the provision and management of online foreign workers permit renewals by not ensuring a level playing field or by applying different conditions to equivalent transactions with other trading parties to the extent that it has harmed competition in the downstream market. In June 2016, MyCC issued its final decision and imposed a 2.27 million ringgit fine on MyEG.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The Competition Act does not mention the consequence of infringement of the Chapter 2 prohibition on the validity of contracts. However, where the consideration for a contract is unlawful, the contract will be void and unenforceable under the Contracts Act 1950. Therefore, a contractual term that amounts to an abuse of dominance under the Competition Act will be rendered unenforceable by virtue of the Contracts Act 1950.

The precise consequences will depend on the specific facts of the case.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Any person who suffers loss or damage directly as a result of an infringement of the Chapter 2 prohibition may bring a private action against the infringing parties in the civil courts.

Such civil action may be initiated even if MyCC has not conducted or concluded an investigation into the alleged infringement. However, in practice, the evidential burden on private parties makes this unlikely unless MyCC's investigation and adjudication process is slow.

MyCC has powers to give the infringing enterprise any direction it deems appropriate. This may include ordering a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract. For example, in the MyCC Dominance Guidelines, MyCC indicates that the remedy for a refusal to supply that infringes the Chapter 2 prohibition is to direct the supplier to supply at a reasonable consideration.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes (see question 31). An aggrieved person may file a private action in court to claim for damages for losses suffered as a result of the infringement.

MyCC has no power to award damages to an aggrieved person.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The decision of the MyCC is appealable by any person who is aggrieved or whose interest is affected by that decision, to the Competition Appeal Tribunal. The Competition Appeal Tribunal's decision is final and binding on the parties to the appeal. However, its decision, and any other administrative decision of the MyCC, may be subject to judicial review by the High Court.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

The Chapter 2 prohibition only applies to dominant firms.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Article 28 of the Mexican Constitution prohibits monopolies and monopolistic practices. This constitutional rule is implemented by the Federal Law of Economic Competition (LFCE), which provides regulation on merger control, absolute monopolistic practices (horizontal restraints or collusive agreements) and relative monopolistic practices. The LFCE defines 13 specific types of conduct that are considered as relative monopolistic practices, referred to as unilateral exclusionary or predatory conduct performed by economic agents having substantial market power in the relevant market. Provisions on relative monopolistic practices are the ones specifically applying to the behaviour of dominant firms.

The LFCE does not use the term 'dominance'. Its equivalent term is 'substantial market power', which may be defined as the capacity to fix prices or restrict the supply to the relevant market without competitors being actually or potentially capable of counteracting such capacity.

The LFCE is enforced by the Federal Economic Competition Commission (CFCE) and the Federal Telecommunications Institute (IFT). The CFCE has jurisdiction over all industries, with the exception of broadcasting and telecommunications where the LFCE is enforced by the IFT.

In this chapter, any references to the CFCE will also apply to the IFT in the context of the broadcasting and telecommunications industries. The acronym CFC will be used for the former Federal Competition Commission.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

As mentioned in question 1, 'substantial market power' is the equivalent concept to dominance under Mexican law. The LFCE does not explicitly define substantial market power but enunciates the elements to be analysed in order to determine whether one or more economic agents enjoy such a power.

One of these elements is 'the capacity to fix prices or substantially restrict the supply to the relevant market without competing agents being actually or potentially capable of counteracting such capacity', which is, in fact, the definition of substantial market power.

Other elements to be analysed in order to assert that an economic agent holds substantial market power are:

- the existence of barriers to entry and the factors that may alter those barriers;
- competitors' existence and power; and
- access to input materials.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The LFCE states that its object is 'to promote, protect and guarantee free competition, as well as to prevent, investigate, fight, effectively pursue, severely punish and eliminate monopolies, monopolistic practices, unlawful mergers, barriers to free competition and other restrictions to the efficient operation of markets'. The underlying standard of the legislation is also strictly economic.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Relative monopolistic practices, which cover abuse of dominance as well as vertical restraints, are investigated and sanctioned under the LFCE, which applies to all sectors equally.

Additionally, certain sector-specific legislation empowers the corresponding agency to establish economic regulation (tariffs, standards of quality or information obligations) when it is determined that a firm has substantial market power or effective competition does not exist in a particular market. These situations must be previously declared by the CFCE under a specific procedure regulated in the LFCE, hereinafter referred to as the 'dominance procedure'. Some sector-specific provisions providing this kind of economic regulation are article 47 of the Railroad Service Law, articles 67, 68 and 70 of the Airports Law, article 43 of the Civil Aviation Law, article 140 of the Navigation and Maritime Trade Law, article 82 of Hydrocarbons Law and articles 279 to 284 of the Federal Law of Telecommunications and Broadcasting (in this case the procedure is followed before the IFT).

In other industries, such as ports (article 62 of the Ports Law), the authority may impose specific regulations on tariffs and prices. Notwithstanding this, the economic agents may ask the authority to remove or modify the regulation, whenever they obtain from the CFCE a resolution stating that competition conditions exist in the corresponding market.

In addition to the economic regulation mentioned above, in the broadcasting and telecommunications industries, the IFT is empowered to determine whether a company is a preponderant agent, in order to impose regulations to avoid damages to competition (related, for example, to information, offer and quality of services, exclusive agreements, tariffs, etc). The threshold to be declared as a preponderant agent is to have a national market share of 50 per cent or more in the specific sector (telecommunications or broadcasting), measured in terms of users, subscribers, audience, traffic or capacity.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Pursuant to article 3 section I and 4 of the LFCE, dominance provisions apply to any person engaged in any economic activity, including government entities expressly. In this regard, it is worth mentioning that article 28 of the Constitution prohibits monopolies and monopolistic

practices. Notwithstanding, this constitutional provision also states that certain 'strategic' economic activities that are performed by the state under an exclusive basis, such as postal services, nuclear energy generation and certain activities related to petroleum and electricity, are not considered as monopolies. Although this exemption is reproduced by article 6 of the LFCE, the same article establishes that the state entities responsible for the aforementioned activities are subject to the LFCE regarding 'the acts not expressly comprehended' in the constitutional provision.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Mexican legislation only provides for the behaviour of already dominant firms. Issues regarding the acquisition or strengthening of substantial market power are specifically addressed in merger control provisions.

However, relative monopolistic practices provisions might indirectly cover conduct through which a non-dominant company becomes or attempts to become dominant, when a monopolist firm in certain relevant markets unlawfully uses its power to monopolise other markets. In any case, the conduct would be covered by the LFCE only if it is performed in connection with goods or services pertaining to the relevant market where the defendant enjoys substantial market power.

7 Collective dominance

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

Yes, collective dominance is covered by the legislation. The LFCE does not explicitly define 'collective substantial market power', but its regulations enunciate the elements that have to be analysed in order to determine whether several economic agents possess such a power. Article 9 of the above-mentioned regulations states that in order to determine if two or more agents have 'collective substantial market power' the CFCE must consider:

- if the economic agents distinguish themselves from other economic agents that participate in the relevant market, taking into account factors that promote common incentives or interdependent strategic behaviour; and
- if the economic agents show similar behaviour.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The LFCE applies to both purchasers and suppliers with no differences. However, legal actions against abuse of dominance conduct by purchasers have been rare in practice.

Moreover, there are some types of conduct that, by their nature, can only be performed by suppliers, such as refusal to deal, predatory pricing and cross-subsidies.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Market definition is the same for all procedures regulated in the LFCE (dominance procedures, relative monopolistic practices investigations and merger control procedures). Article 58 of the LFCE establishes the elements to be analysed in order to define a relevant market. In general terms, the definition of a relevant market must include the product or service and its close substitutes, as well as the geographical area where the said product or service is offered or demanded.

There is no market-share threshold above which a company is presumed to be dominant. The analysis to conclude whether or not an economic agent has substantial market power must be made on a case-by-case basis. The most important elements to be analysed in order to assert that an economic agent holds substantial market power are:

- the market share of the economic agent subject to analysis and how it compares with its competitors' market shares;
- the existence of barriers to entry and the factors that may alter those barriers; and
- the access to input materials.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The term abuse is not defined by the LFCE. Notwithstanding, several types of conduct considered abusive under other jurisdictions may constitute relative monopolistic practices under Mexican law, as shown in questions 14 to 25. Article 56 of the LFCE defines 13 specific relative monopolistic practices. Mexican law follows an effects-based approach to identifying anticompetitive conduct since relative monopolistic practices may be deemed illegal only if the conduct is performed by an economic agent possessing substantial market power and the conduct's purpose or effect is to unduly displace other economic agents from the market, to substantially preclude their access to the market or to create exclusive advantages in favour of one or several persons. Additionally, efficiency gains and their competitive effects may be alleged to sustain the legality of a relative monopolistic practice as explained in question 13.

Unilateral conduct is never prohibited per se under Mexican law. Only horizontal restraints or collusive agreements (absolute monopolistic practices) are prohibited per se and shall always be null and void regardless of their effect on the market.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Only predatory and exclusionary unilateral conduct falling into a specific relative monopolistic practice definition is covered under the LFCE. A dominant firm does not violate the LFCE simply by exploiting its power and charging monopolistic prices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In order for a relative monopolistic practice to be illegal, the conduct in question must be performed in connection with goods or services pertaining to the relevant market where the defendant possesses substantial market power. Notwithstanding, the displacement of other economic agents (which is also a condition for the practice to be deemed illegal) may occur with respect to an adjacent but related market to the dominated market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The main defences, usually raised to an allegation that a certain conduct constitutes a relative monopolistic practice are:

- an inaccurate definition of the relevant market due to the existence of close substitutes of the product or service in question;
- the absence of barriers to entry and, therefore, the lack of substantial market power; and
- that the conduct generates efficiency gains so that net contribution to consumers' welfare overcomes its anticompetitive effects.

Specific forms of abuse

14 Rebate schemes

This conduct is covered by article 56, section VIII of the LFCE. According to this provision, granting of discounts or incentives with the requirement of not using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed or marketed by a

third party is a relative monopolistic practice. Thus, rebate schemes, as well as conduct referred to in questions below falling into the relative monopolistic practice concept, will only be deemed illegal if:

- the conduct is performed by an economic agent possessing substantial market power;
- the conduct's purpose or effect is to unduly displace other economic agents from the market or to substantially preclude their access to the market or to create exclusive advantages in favour of one or several persons; and
- the net contribution to consumers' welfare does not overcome the anticompetitive effects of the conduct.

In 2004 Miller filed a complaint before the CFC against breweries Modelo and Femsa, alleging preclusion of access to the beer sales market (through small shops) owing to economic incentives granted by the defendants in exchange for exclusive dealing. In 2006, after an appeal for reconsideration filed by Modelo, the CFC closed the case with no liability for the defendant, revoking its first decision. In 2007 the CFC decided Femsa was not liable either.

Owing to the way the aforementioned procedure was solved (a mistake in the definition of the relevant market), in 2010 Miller was able to file a similar complaint. In 2013 the CFC decided to close the procedure on condition that the investigated agents complied with specific obligations and competition protection measures.

15 Tying and bundling

According to article 56, section III of the LFCE, the sale or a transaction subject to the condition of buying, acquiring, selling or providing another different or distinguishable good or service is a relative monopolistic practice.

In 2013, the CFC fined PEMEX Refinación (a state-owned company operating in a strategic area that processes, transports and markets a wide range of products derived from crude oil) with 651,606,052.66 Mexican pesos for tied sales in the gasoline and diesel market. The practice consisted of a condition imposed by PEMEX Refinación on gas stations to hire PEMEX Refinación for the transport of gasoline and diesel, regardless of the conditions and the prices placed on them. This meant that gas stations were unable to transport fuel by their own means or determine who to hire. The CFC considered this as a relative monopolistic practice. However, the Supreme Court recently determined that the transport of gasoline and diesel was included in the 'strategic' economic activities exemption (see question 5).

16 Exclusive dealing

According to article 56, section IV, of the LFCE, a sale, purchase, or transaction subject to the condition of not using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed or marketed by a third party is a relative monopolistic practice.

In 2005, the CFC fined some Coca-Cola distributors for denying the supply of Coca-Cola products to customers refusing to accept the condition of not selling rival Big Cola products.

17 Predatory pricing

This conduct is specifically defined as a relative monopolistic practice by article 56, section VII of the LFCE. Under this provision, there is predatory pricing when there are sales at prices below their average variable cost or sales at prices below average total cost, but above their average variable cost, when it can be presumed that the losses will be recouped through future price increments.

The most important case related to this type of conduct took place in the chewing gum sales market. Cannel's sued Warner Lambert for predatory pricing, sustaining that the conduct was covered by section VII of article 10, then in force, which contained a general provision stating that any action unduly harming competition process was considered as a relative monopolistic practice. The CFC found liability, but the Supreme Court declared former section VII as an unconstitutional provision, since it lacked the specifics of the prohibited conduct, and forced the said agency to revoke its decision.

18 Price or margin squeezes

Price or margin squeezes are covered by article 56, section XIII. Under this section, there is price or margin squeezing when an economic agent reduces the margin between the access price to an essential input and the price offered for processed goods or services to the final consumer, when the essential input is used for production by the same economic agent.

On 7 April 2011, the CFC fined Telcel, the largest mobile telephony provider in Mexico, for charging its competitors higher rates for call termination services than those offered to its final customers for the mobile telephony service. It is worth mentioning that the amount of the fine, at that time around US$936 million, is the highest that has ever been imposed by the competition authority. However, in the appeal process, Telcel offered several commitments. The CFC considered the commitments were viable and revoked its resolution. This decision was taken under the provision formerly contained in article 10 section XI of the former LFCE (in force until 6 July 2014).

19 Refusals to deal and denied access to essential facilities

Refusal to deal is explicitly covered by article 56, section V of the LFCE. Under this provision, refusing to sell, market or provide to certain persons goods or services that are usually offered to third parties is a relative monopolistic practice.

On the other hand, denied access to essential facilities is covered by article 56, section XII. Under this provision, denying, restricting or establishing discriminatory conditions in access to essential facilities is a relative monopolistic practice. Also, the LFCE contains certain provisions and a procedure for the determination of essential facilities and essential input materials (articles 60 and 94) in order to regulate access to them. Access to essential facilities is commonly regulated in sector-specific laws (eg, the Federal Telecommunications Law obliges all operators to interconnect their networks to each other's networks).

In November 2009, the CFC fined Televisa for refusing to sell broadcasting signals to competitors in the pay-television market. The CFC highlighted that some of Televisa's broadcasting signals are an essential good for other pay-television providers since they enjoy substantially higher ratings than any other broadcasting signal. Likewise, on 26 May 2011 the CFC fined Telmex around US$7 million (at that time) for refusing to interconnect a competitor to its fixed telecommunications network. Telmex was also forced to interconnect the competitor.

20 Predatory product design or a failure to disclose new technology

This type of conduct may be covered by article 56, section XI of the LFCE, which establishes that any action increasing rivals' costs or to hinder rivals' productive processes is a relative monopolistic practice.

21 Price discrimination

This conduct is explicitly covered by article 56, section X of the LFCE. According to this provision, the imposition of dissimilar selling or buying prices or conditions to buyers or sellers situated in equal conditions is a relative monopolistic practice.

22 Exploitative prices or terms of supply

These practices are not covered by Mexican competition law. Abuse of dominance is always predatory or exclusionary.

23 Abuse of administrative or government process

This type of conduct may be covered by article 56, section XI of the LFCE, which establishes that any action increasing rivals' costs, reducing rivals' demand or hindering rivals' productive processes is a relative monopolistic practice.

In July 2002, the CFC fined several gas companies for obstructing the construction of a competitor's storage facility. The obstruction consisted, among other actions, of filing motions before courts to obtain orders suspending a 'dangerous' construction without any legal basis. This decision was taken under the general provision formerly contained in article 10, section VII of the former LFCE (in force until June 2006).

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions as exclusionary practices do not fall within the relative monopolistic practices concept, but may be prevented or challenged by means of the LFCE's merger control provisions.

25 Other abuses

Besides those explained in questions 14 to 24, the following types of conduct are defined in article 56 of the LFCE as relative monopolistic practices (although some of them are not characterised by other jurisdictions as abuse of dominance practices but as vertical restraints): resale price maintenance, cross-subsidies, boycotts and vertical market segmentation.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The authorities in charge of preventing, prosecuting and sanctioning relative monopolistic practices in the administrative sphere are the CFCE and the IFT (see question 1).

In terms of articles 28, section II and 119 of the LFCE, the CFCE may request information and documents. Requests can be issued to any person presumed to have knowledge or relation to any fact under investigation.

In practice, the CFCE issues its requests on the basis that all documents are relevant and pertinent, just because it has initiated an investigation.

Moreover, it is important to mention that the authority frequently issues requirements to the agent under investigation. In addition, if the CFCE presumes that there is evidence considered necessary for the investigation in the premises of the agent under investigation, it is entitled to perform dawn raids. If the addressee is not at the corresponding place, these proceedings can be carried out with any person found at the premises, without needing to leave any kind of subpoena.

Finally, the authority can subpoena individuals in order to testify regarding the facts under investigation. There is no certainty about the implications of declaring as a witness, possible offender or as a 'person related to the investigated market'. Thus, there is no certainty about the rights that summonsed people have. There is no precedent yet about the impossibility of using the information given by deponents to incriminate themselves.

However, the Supreme Court has determined that the principle of the presumption of innocence is applicable (with some exceptions) to the administrative sanctioning procedure.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The CFCE may impose fines (based mainly on percentages of income) and remedies as a result of an investigation of abuse of dominance conduct by:

- ordering a firm to cease the illegal practice;
- imposing a fine of up to the equivalent of 8 per cent of the annual income of the infringing party, during the preceding fiscal year, for the performance of a relative monopolistic practice;
- imposing a fine of up to 15.1 million Mexican pesos on the individuals engaging in the illegal conduct, acting on behalf of legal entities;
- imposing a fine of up to 13.5 million Mexican pesos on the firms or individuals that have cooperated with the infringing party; and
- disqualification from acting as an adviser, administrator, officer, manager, directive, executive, agent, representative or proxy of any company for up to five years.

In cases of recidivism, the CFCE may impose a fine up to twice the applicable amount or may order the divestiture or sale of assets, rights, ownership interests or stock in the portion as may be required for the elimination of the anticompetitive effects.

As mentioned in question 18, the highest fine ever imposed for abuse of dominance was to mobile telephony provider Telcel and the amount of the fine was around US$936 million at the time.

Update and trends

In June 2013, the Constitution was amended to transform the CFCE and the IFT into two autonomous constitutional entities and to increase the effectiveness of competition policy and law enforcement.

On 7 July 2014, a new Competition Law came into force.

In November 2014, the CFCE issued new Regulations of the LFCE.

In January 2015, the IFT issued new Regulations of the LFCE.

In April 2015, the CFCE issued new technical criteria to measure concentration of markets. As a consequence, such criteria are no longer applicable for relative monopolistic practices (only for merger control cases).

In June 2015, the CFCE issued new guidelines regarding the initiation of investigations of relative monopolistic practices and the investigation procedure of such practices.

In June and August 2016, the Railroads Law and its Regulations were amended in order to modify the sector-specific dominance rules and to empower the Federal Railroads Agency to establish economic regulation (tariffs). Also, a dominance procedure was initiated by the CFCE on September 2016 to determine whether effective competition exists in several railroad-related markets.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The competition enforcers are empowered to impose sanctions directly. Notwithstanding, such decisions may be challenged through an *amparo* trial before the Federal Specialised Courts in Competition, Telecommunications and Broadcasting.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Between January 2012 and August 2013, the CFC concluded 12 proceedings aimed at investigating and sanctioning relative monopolistic practices. In five of these proceedings the CFC imposed fines on the agents under investigation. Three proceedings were closed, on condition that the investigated agents complied with specific obligations and competition protection measures. The rest of the proceedings were closed, absolving the investigated agents from responsibility. Also, between September 2013 and the time of writing, the CFCE concluded nine proceedings aimed at investigating and sanctioning relative monopolistic practices. In four of these proceedings the CFCE imposed fines on the investigated agents. One proceeding was closed on condition that the investigated agents complied with specific obligations and competition measures. The rest of the proceedings were closed, absolving the investigated agents from responsibility. The IFT (created in September 2013) concluded one proceeding in which a company was fined and two proceedings were closed.

The average length of the procedure, from the start of the investigation to the final decision, is three years. The most recent high-profile case is the *Pemex Refinación* case (see question 15).

The most recent relative monopolistic case is one that involved the Mexico City Airport and several taxi companies that had permits to operate in the premises. The conduct consisted in the imposition of dissimilar price conditions to economic agents situated in equal conditions (price discrimination). Specifically, Mexico City Airport applied differentiated rates for parking and access to the airport to all the taxi companies, except to one. The conduct had the effect of unduly displacing the excluded taxi company and the creation of exclusive advantages in favour of the other companies. The investigation was initiated on October 2013 and the decision was issued on September 2016. The CFCE imposed a fine of 63 million pesos on Mexico City Airport.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

There are no direct consequences for the validity of contracts entered into by dominant companies. However, since the CFCE may order the correction or cessation of a relative monopolistic practice as a sanction, a resolution stating that this kind of illegal conduct has taken place could result in further nullification or modifications to some terms of contracts.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Article 67 of the LFCE entitles any third party to file a complaint before the CFCE against any economic agent performing relative monopolistic practices. The CFCE may order the cessation of the practice, which could imply an obligation on the dominant firm to grant access, supply goods or services, conclude a contract, invalidate a provision or to perform whatever action is required to cease the illegal conduct.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Damages claims for relative monopolistic practices have not been frequent in Mexico since a decision from the competition authority judging a party is responsible (as a legally settled matter) is necessary for initiating a process on the matter. In fact, the end of 2016 saw the first ever damages claim filed before Mexican courts (decision pending at the time of writing). However, this damages claim derives from a cartel conduct case. Thus, private antitrust tort practice is still under development.

Damages claims can be lodged by both individuals or through a class action. The latter can be lodged by the CFCE, by a group of no less than 30 members, by not-for-profit civil organisations whose purpose is the defence of rights and interest in antitrust matters and by the Attorney General of Mexico. The balance of the advantages and disadvantages of class actions is still pending.

Federal specialised courts in competition, telecommunications and broadcasting have jurisdiction over individual and collective damages claims.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The decisions of the CFCE and IFT may be challenged through an *amparo* trial before the Federal Specialised Courts in Competition, Telecommunications and Broadcasting. This trial is aimed to revoke unconstitutional or illegal decisions of any kind of authorities.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

There are no rules applying to unilateral conduct performed by non-dominant firms.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The Moroccan rules applying to the behaviour of dominant firms were formerly set out in Law No. 06-99 of 5 June 2000 (Dahir No. 01-00-225) on free pricing and competition (the Former Law) and its enforcement decree No. 2-00-854.

However, a new set of laws relating to competition and dominance has been adopted: Law No. 20-13 of 30 June 2014 (Dahir No. 1-14-117) relating to the Competition Council (and its enforcement decree No. 2-15-109 of 4 June 2015) and Law No. 104-12 of 30 June 2014 (Dahir No. 1-14-116) on free pricing and competition (and its enforcement decree No. 2-14-652 of 1 December 2014) (the Law).

Abuses of dominant position are regulated by article 7 of both the Former Law and the Law, which prohibit the abusive exploitation by an undertaking or a group of undertakings of a dominant position on the interior market or a substantial part of it, if the abusive exploitation has as object or may have as effect to prevent, restrict or distort competition.

Under the Former Law, the Moroccan authorities responsible for enforcement were:

- the Chief of Government, who could adopt certain measures or refer the matter to the King's Prosecutor at the relevant first instance court for the purposes of prosecution; and
- the Competition Council, which had a consultative role: it could issue opinions on matters of principle submitted for its assessment or make recommendations that could lead to the issuance of orders or prosecution. The opinions of the Competition Council mentioned in this article were released by the Competition Council under this former legal framework.

Under Law No. 20-13 and the Law, the Moroccan Competition Council is now granted decision-making power over abuses of dominance cases.

It should be noted that Law No. 20-13 and the Law will only take effect after the appointment of the new members of the Competition Council (the mandate of the former members ended in October 2013), which should, in principle, occur in 2017 and that the new functions of the Competition Council are, therefore, not yet operational. In the meantime, the Competition Council continues its former consultative function, but no opinion or annual report has been issued since 2013.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The concept of dominance is not defined under Moroccan law.

However, the Competition Council uses the definition retained by international case law and doctrine and defines dominance as the position enjoyed by an undertaking that affords it the power to evade the market conditions and to behave independently to an appreciable extent from its competitors and consumers.

The market power depends not only on the market share but can also be inferred from other elements such as belonging to a group, enjoying financial power or being present at all stages of the production process.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The Moroccan Competition Council has clearly stated that the Moroccan competition legislation aims at promoting the economic and social development (information letters of the Competition Council of September and October 2010, of April 2011 and of December 2012), in particular dealing with poverty, as well as furthering competitiveness of Morroccan undertakings within the international context.

Under article 9 of the Law, the practices, whose perpetrators can prove that they have the effect of ensuring economic or technical progress, including by creating or maintaining jobs, and that they reserve for users a fair share in the resulting profit without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products or services in question are not subject to the provisions of article 7. Those practices may impose restrictions on competition only insofar as these are essential to achieve this aim of progress. Certain categories of agreements or certain agreements, in particular when they are intended to improve the management of small or medium-sized undertakings or the marketing of farmers' products, may be recognised as meeting the conditions set out in article 9 by the administration after a favourable opinion from the Competition Council.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Certain specific sectors are regulated by sectoral regulators who aim notably at helping the sectors reach their competitive maturity. These sectoral regulators include the National Telecommunications Regulatory Authority (ANRT) for the telecommunications sector, the High Authority for Audio-visual Communication (HACA) for the audio-visual market, the Bank Al Maghrib for banks, the Council for Ethical Standards in the Securities Market for the stock exchange, the Insurance and Social Security Directorate for insurance and the National Ports Agency (ANP) for ports.

However, there are no sector-specific provisions relating to abuses of dominance and the sectoral regulators usually take into account or apply the provisions of article 7 of the Law.

According to article 109 of the Law, the Competition Council will be granted jurisdiction over all sectors within the competence of the sectoral regulators at a date that will be set by regulation, except when the relationship between the Competition Council and the sectoral regulators is ruled by the texts establishing these sectoral regulators. This is particularly the case for the ANRT and the HACA, which have powers to settle disputes pursuant to article 7 and must inform the Competition Council of their decisions.

Moreover, article 8 of Law 20-13 relating to the Competition Council states that the Competition Council shall receive the opinion of the sectoral regulators when the matter concerns their sector. The Competition Council is also entitled to call on the skills and expertise of these sectoral regulation authorities for the purpose of the investigation.

Similarly, the Competition Council may also be consulted by the sectoral regulators on any matter of principle concerning competition (article 5 of Law 20-13 relating to the Competition Council).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Article 7 of the Law applies (article 1):

- to any natural or legal person, whether or not it has its registered office or establishments in Morocco, if its transactions or behaviour have as an object, or may have an effect on, competition on the Moroccan market or a substantial part of such market; and
- to all production, distribution or services activities, including those carried out by legal public persons when they act as economic operators and not in the exercise of their prerogatives of public power or in the performance of their public service tasks. For instance, in Opinion No. 6/09 of 9 September 2009 relating to marine pilotage, the Council accepted making recommendations about the legality of the commercial activities carried out by the ANP, but refused to examine the measures adopted by the ANP within the framework of its public authority tasks.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Article 7 applies only to already dominant firms.

However, it should be noted that the transactions through which firms acquire or strengthen a dominant position are, in principle, examined through Moroccan ex ante merger control procedure.

7 Collective dominance

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

Collective dominance is clearly covered by article 7 of the Law, which prohibits abusive practices by one undertaking or 'a group of undertakings'.

In its Opinion of 22 December 2011 relating to the acquisition of insulin, the Competition Council considered that two undertakings were holding a collective dominant position on the market, by taking into account the following reasons:

- the market had an oligopolistic structure and was split between the two main undertakings (which respectively held around 48 per cent and 47 per cent of market shares);
- the market was transparent, each member of the dominant duopoly knowing the other undertaking's conduct;
- both undertakings had adopted a common course of action to exclude their main competitor from the market; and
- there was no potential competitor on the market after the exclusion of the main competitor.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Moroccan law relating to abuses of dominance appears to apply to dominant purchasers. It has, for instance, been the case in the Opinion No. 26/10 of 13 November 2012 relating to the market of maritime transport of Casablanca's tramway train sets in which the Competition Council held that an undertaking that was the only buyer in a market, therefore, in a monopsony situation, enjoyed a dominant position.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The relevant market is defined as the meeting place of supply and demand of certain products or services that are regarded as substitutable from the demand side perception (nature of the products, prices and use) and from the supply side perception (ability to access the market in the case of price increase) in a determined geographic area (Opinion No. 5/09 of 7 September 2009 of the Competition Council relating to the sector of the scholar book).

The test for market definition does not appear to differ from the test for merger control purposes.

The provisions of Moroccan law relating to abuses of dominance do not provide for a market-share threshold above which a company will be presumed to be dominant.

Nevertheless, it follows from the Competition Council's case law that firms that were qualified as dominant all hold market shares above 40 per cent. Moreover, it should be noted that Moroccan merger control rules provide for a 40 per cent market-share notification threshold.

However, the existence of a dominant position is not automatically established when the market share is higher than 40 per cent. For instance, in its Opinion of 22 December 2011, relating to the acquisition of insulin, where two undertakings both had important market shares (around 48 per cent and 47 per cent), the Competition Council considered that there was no individual dominant position, as the existence of a dominant position must be assessed in the light of the competitors' market shares (a collective dominant position was, however, identified by the Competition Council in this case).

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Abuse is not defined by Moroccan law. However, article 7 of the Law specifies that the abusive exploitation of a dominant position is prohibited if the abusive exploitation has 'as an object' or 'may have as an effect' to prevent, restrict or distort competition. Article 7 also provides a non-exhaustive list of examples of abuses such as refusal to sell, tying sales, discriminatory selling conditions, termination of an established commercial relationship on the sole ground that the partner refuses to consent to unjustified commercial conditions and direct or indirect imposition of a minimum resale price for goods or services or of a minimum sales margin.

Therefore, it appears that Moroccan law follows both an effects-based and a form-based approach to identify abusive practices.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative (eg, tying sales to consumers in Opinion No. 22/12 relating to competition between banks and insurance agents and brokers concerning presentation of insurance) and exclusionary practices (eg, refusal to sell in the Opinion relating to the market of the sale of plane tickets and the Opinion relating to competition in Marrakech's movie sector in 2013).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The holding of a dominant position is needed for the application of article 7 but the decisional practice of the Competition Council still has to clarify whether a causal link must be shown between dominance and abuse and whether conduct can be abusive if it takes place on an adjacent market to the dominant market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Under article 9 of the Law, the prohibition of abuse of dominance shall not apply:

- when the practices result from the implementation of an act or regulation (see, for instance, Opinion No. 26/10 of 13 November 2012

relating to the market of maritime transport of Casablanca's tramway train sets in which the Competition Council considered that a company, which had issued a call for tenders and had rejected a tender because of the Moroccan nationality of the tenderer, had not abused its dominant position because its selection was made in conformity with agreements between France and Morocco); and

- to the practices whose perpetrators can prove that they have the effect of ensuring economic or technical progress, including by creating or maintaining jobs, and that they reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products or services in question. Those practices may impose restrictions on competition only insofar as these are essential to achieve this aim of progress (see, for instance, the Opinion relating to the movie sector in Marrakech of 2013 in which the Competition Council took into account the fact that a dominant company accused of refusal to sell had made substantial investment for the development of the sector).

Moreover, certain categories of agreement or certain agreements, in particular when they are intended to improve the management of small or medium-sized undertakings or the marketing of farmers' products, may be recognised as meeting the conditions set out in article 9 by the administration after a favourable opinion from the Competition Council.

It is, thus, possible to invoke efficiency gains. The Competition Council has not pronounced itself yet on whether defences are an option when exclusionary intent is shown but the requirement not to eliminate competition on the market makes it difficult for an exclusionary practice to meet the exemption conditions.

Further, agreements of minor importance that do not appreciably restrict competition (in particular, agreements between small and medium-sized companies) may also fall outside article 7 of the Law.

Specific forms of abuse

14 Rebate schemes

Despite the fact that the provisions of the Law do not expressly refer to them, rebate schemes can be considered as abuses of dominant position. For instance, in a study of 2011 relating to mobile telephony, the Competition Council stated that targeted discounts could be considered as abusive if they restrict market fluidity. Moreover, in its Opinion No. 32/12 relating to a concentration between the SNI group and Danone, the Competition Council underlined the potential anticompetitive behaviour of the Centrale Laitière, which was, despite is dominant position, engaged in an aggressive rebate policy.

15 Tying and bundling

Under article 7 of the Law, tying sales by a dominant undertaking can be prohibited. Tying sales occur whether two products are only sold jointly or are also available separately but at a higher price.

In its study relating to mobile telephony of 2011, the Competition Council indicated that tying sales constitute an abuse of dominant position when they restrict the fluidity of the market, unless they produce efficiency gains.

16 Exclusive dealing

Though exclusive dealing (which requires a customer to exclusively – or almost exclusively – purchase from or deal with a dominant undertaking) is not expressly listed among the examples of abusive practices provided by article 7 of the Law, the Competition Council considers that exclusivity obligations may sometimes have as an object or as an effect to prevent, restrict or distort competition.

For instance, according to the Competition Council, if a firm requires exclusivity from a specific distributor while not requiring it from others, such obligation may fall into the category of the abuses of dominance (information letter No. 10 of March 2011).

The Competition Council has also considered that the exclusivity stipulations contained in a dominant supplier's contracts (relating to the fitting out of its products displays) could be seen as an exclusive supply obligation as a result of its broad portfolio of products and, thus, have an anticompetitive effect owing to its dominant position (Opinion No. 23/12 of 15 May 2012 relating to competition on manufactured tobacco).

17 Predatory pricing

According to the Competition Council, an undertaking abuses its dominant position by its low price policy when it has as the object or the effect of eliminating its victim from the market. In its Opinion of 22 December 2011 relating to the acquisition of insulin, the Competition Council took into account the fact that the dominant undertakings concerned had both adopted predatory pricing policies to evict their main competitors from the market before raising their prices following its eviction.

18 Price or margin squeezes

To the best of our knowledge, the Competition Council has not yet rendered its opinion regarding this kind of practice, which we assume should be considered abusive if it has as object or may have as an effect to prevent, restrict or distort competition and, in particular, to exclude a competitor from the market. A price or margin squeeze occurs when a vertically integrated firm holding a dominant position on the upstream market charges prices on this market which, compared with the prices it charges on the downstream market, does not allow a competitor to generate profits on the downstream market.

19 Refusals to deal and denied access to essential facilities

According to article 7 of the Law, refusals to sell may be prohibited (for applications, see the Opinion relating to the movie distribution market in Marrakech and the Opinion relating to the market of the sale of plane tickets of 2013).

Concerning access to essential facilities, in its information letter No. 3 of March 2010, the Competition Council referred to the essential facilities doctrine of European Union case law and stated that an undertaking occupying a dominant position on an upstream market infringes the prohibition of abuses of dominance if it refuses access, without objective justification, to a facility:

- whose access is essential to carry out an activity on a downstream market; and
- which is impossible to duplicate under reasonable conditions, preventing, consequently, the appearance of a new product or a new technology.

20 Predatory product design or a failure to disclose new technology

Although there is no case law regarding these issues yet, we can surmise that the Competition Council may prohibit such practices if they have as an object or may have as an effect to prevent, restrict or distort competition.

It should be noted that, according to the Competition Council, the protection of intellectual property must reconcile with competition requirements and intellectual property rights may constitute an abuse of monopoly, in particular when the essential facilities doctrine is applicable (see question 24 regarding access to essential facilities and the information letter of the Competition Council No. 3 of March 2010).

21 Price discrimination

Article 7 of the Law provides that discriminatory selling conditions can be considered as an abuse of dominant position.

22 Exploitative prices or terms of supply

Excessive prices and discriminatory or unjustified terms of supply that limit the commercial freedom of the undertaking's economic partner might be considered as exploitative abuses. Article 7 indicates in this regard that an abuse may notably consist in tying sales and direct or indirect imposition of a minimum resale price for goods or services, or of a minimum sales margin to the dominant undertaking's economic partner.

23 Abuse of administrative or government process

Although the Law does not clearly state than an abuse of dominant position can be the consequence of an abuse of government process, it should be noted that, in a study of 2011 relating to competition in the pharmaceutical industry, the Competition Council denounced the 'abusive' use of the proceedings of marketing authorisations by certain multinational groups that hold monopolies awarded by patents in order to prevent the market entry of generics.

Update and trends

The year 2017 should, in principle, be the first year of application of Law No. 20-13 of 30 June 2014 relating to the Competition Council and Law No. 104-12 of 30 June 2014 on free pricing and competition which transfer the decision-making power over dominance cases to the Competition Council. These laws will take effect after the appointment of the new members of the Competition Council.

24 Mergers and acquisitions as exclusionary practices

To the best of our knowledge, the Competition Council has not, to date, ruled on whether mergers and acquisitions as exclusionary practices can be regarded as abusive (which could, in particular, potentially be the case when the merger control rules are not applicable).

25 Other abuses

It should, in particular, be noted that, under article 7, an abuse may also consist in the termination of an established commercial relationship on the sole ground that the partner refuses to consent to unjustified commercial conditions.

Moreover, the list of examples of abuses provided by article 7 is not exhaustive.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Under the former law

The Moroccan authorities responsible for enforcement under the current law were:

- the Chief of Government, who could adopt conservatory measures, order the parties to put an end to the abusive practices, impose conditions on them or refer the matter to the King's Prosecutor at the relevant first instance court for criminal sanctions applicable to natural persons or impose fines; and
- the Competition Council, which had a consultative role: the Competition Council could issue opinions on matters of principle submitted for its assessment or make recommendations that could lead to the issuance of orders or prosecution.

Under the current law

Under the law, the Competition Council, in addition to its consultative role to the Parliament, the government, the courts and various organisations (article 5 of Law No. 20-13 relating to the Competition Council), is granted the decision-making power over abuses of dominance cases. The Competition Council may be adopted by the undertakings and is now able to avail itself of practices (articles 3 and 4 of Law No. 20-13 relating to the Competition Council).

The Competition Council is also granted powers of investigation. The President of the Competition Council is entitled to ask the administration to carry out any useful investigation and to call on relevant expertise. The investigations will be carried out by inspectors, including case officers of the Competition Council, administrative officials and price controllers. The officers are entitled to visit any premises, land or transport employed for professional use, to request the communication of all professional documents (including books and bills) and copy them, and to collect any information and justification (article 68 and following of the Law).

If an undertaking or related organisation does not comply with a summons, does not respond within the time limit to an information or a document request of the Competition Council or obstructs the investigation (eg, by providing false or incomplete documents), sanctions are applicable.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The Competition Council, under the Law, is, in particular, empowered to:

- adopt conservatory measures (article 35 of the Law);
- order the firm to put an end to its abusive practice or impose specific conditions (article 36 of the Law);
- accept remedies proposed by the firm to remove the competition concerns (article 36 of the Law); and
- impose a fine, either immediately or where the firm does not comply with an order or does not respect an accepted remedy (article 39 of the Law).

If the offender is not a company, the maximum amount of the penalty is 4 million dirhams. The maximum amount of the penalty for a company is 10 per cent of the highest worldwide or national (if the firm does not have international activities) turnover, net of tax, achieved in one of the financial years ended after the financial year preceding that in which the practices were implemented. If the accounts of the company concerned have been consolidated or combined by virtue of the texts applicable to its legal form, the turnover taken into account is that shown in the consolidated or combined accounts of the consolidating or combining company.

The fine takes into consideration the seriousness of the offence, the scale of the damage caused to economy and the situation of the company.

The maximum amount of the applicable fine may be doubled in the event of a subsequent offence within five years.

The maximum amount of this fine may be reduced by half if the company does not contest the facts (article 37 of the Law).

A transaction may also be proposed by the competent governmental authority to undertakings whose abusive practices affect a local market, provided that their turnovers do not exceed certain thresholds (article 43 of the Law).

Moreover, the Competition Council may refer the matter to the King's Prosecutor at the relevant first instance court if the facts are likely to justify the application of article 75 of the Law, which provides that a natural person who fraudulently or knowingly takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in article 7 shall be punished by a prison sentence of between two months and one year and a fine of between 10,000 and 500,000 dirhams.

Finally, it should be noted that the Competition Council could, in the event of an abuse of a dominant position, enjoin, by a reasoned order, the undertaking or group of undertakings to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out, even if these acts have been subject to the merger control procedure (article 20 of the Law).

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Under the Law, the Competition Council is empowered to impose sanctions directly to the abusive undertakings without petition a court or another authority.

If the facts are likely to justify the application of article 75 of the Law (which provides that a natural person who fraudulently or knowingly takes a personal and decisive part in the conception, organisation or implementation of the practices referred to in article 7 shall be punished by a prison sentence of between two months and one year and a fine of between 10,000 and 500,000 dirhams), the Competition Council shall, however, refer the matter to the King's Prosecutor at the relevant first instance court.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Since Law No. 20-13 and the Law will only take effect after the appointment of the new members of the Competition Council, the Competition

Council continues, in the meantime, its former consultative function and no opinion or annual report has been issued since 2013.

Between 2009 (the year of its reactivation) and 2013, the Competition Council had, on average, issued several opinions and studies each year relating to abusive practices. In its latest annual report, issued in 2013, the Competition Council rendered an Opinion relating to the market of the sale of plane tickets in which the legality of Royal Air Maroc's commercial policy was examined. In this case, travel agencies accused Royal Air Maroc of abusing its dominant position by selling some preferential rate tickets exclusively through its own website. However, the Competition Council considered that this practice did not constitute an abuse of Royal Air Maroc's dominant position.

It should be noted that, in 2016, a complaint was lodged against the company BeIN Sports for abuse of dominant position related to the conditions of broadcasting the UEFA soccer championship in Morocco.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

According to article 10 of the Law, any commitment, agreement or contractual clause referring to a practice prohibited by article 7 shall be null and void. This nullity may be invoked by the parties or by a third party (but may not be raised by the parties against a third party) and may be declared by the courts having jurisdiction (to which the Competition Council's opinion or decision, if any, shall be communicated and which can also consult the Competition Council).

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is possible before the courts to which the Competition Council's opinion or decision, if any, may be transferred, in order to obtain, in particular, the invalidity of an agreement or contractual clause referring to a practice prohibited by article 7.

Moreover, article 106 of the Law provides that registered consumers' associations may obtain compensation of the prejudice suffered by the consumers by filing acivil suit. Moroccan law is not clear as to whether individuals may claim damages before civil courts without a previous investigation by the Competition Council.

The Law provides a basis upon which the Competition Council may order a dominant firm to grant access to infrastructure or technology, supply goods or services or to conclude a contract, as the Law entitles the Competition Council to impose specific conditions, to accept remedies proposed by the dominant firm to remove the competition concerns (article 36 of the Law) or to enjoin, by a reasoned order, the undertaking or group of undertakings to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out (article 20 of the Law).

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices have a claim for damages before the courts, which assess the damage suffered by the plaintiff. Unfortunately, the decisions of the Moroccan courts (which have jurisdiction to grant damages for an abuse of a dominant position) are very difficult to access and therefore, we are not able to provide any examples.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The decisions of the Competition Council may be appealed to the Court of Appeal of Rabat within 30 days from the date of receipt of the notification (articles 44 and 46 of the Law). When the Court of Appeal annuls or invalidates a decision, it is required to give a ruling on the case without referring it.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Moroccan law provides several rules applying to the unilateral conduct of non-dominant firms.

The abusive exploitation by an undertaking or a group of undertakings of the economic dependence of a client or supplier that does not have an equivalent alternative, if the abusive exploitation has as its object or may have as an effect to prevent, restrict or distort competition, is prohibited under article 7 of the Law.

Moreover, article 8 of the Law has introduced a new rule by prohibiting selling price offers or selling price practices to consumers that are abusively low compared with production, transformation and commercialisation costs, if the offer or practice has as its object or potential effect to exclude from the market, or to prevent from entering into a market, an undertaking or its products (these provisions do not apply to goods or services purchased for resale in the same condition).

Finally, articles 58 to 61 of the Law provide rules regarding the unilateral restrictive competition practices of all firms.

In particular, article 60 of the Law forbids the direct or indirect imposition of a minimum resale price to goods or services or of a minimum sales margin.

Moreover, under article 61 of the Law, it is, in particular, forbidden to all producers, importers, wholesalers or service providers:

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- to apply to an economic partner, or obtain from an economic partner, discriminatory and unjustified prices, payment deadlines and conditions or terms of sales;
- to refuse to fulfil a buyer's request made in the context of his or her professional activity if the request is not abnormal and is made in good faith; and
- to subordinate the sale of a product or service for professional use to the concomitant purchase of other products, to the purchase of an imposed quantity or to the provision of another service.

Netherlands

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Article 24 of the Dutch Competition Act (Mw) prohibits undertakings from abusing a dominant position. The prohibition under article 24 Mw is very similar to its European equivalent, article 102 of the Treaty on the Functioning of the European Union (TFEU).

The Dutch legislator's explanatory memorandum to the Dutch Competition Act (the Explanatory Memorandum) is the main source for further guidance on the application and interpretation of article 24 Mw. The Explanatory Memorandum provides that article 24 Mw should be interpreted in accordance with the decisional practice and case law as applied under article 102 TFEU. This was confirmed by the Supreme Court in *VTN* (2005). As a result, the substantial interpretation and application of article 24 Mw is to a large extent directly based on the case law of the European Court of Justice (ECJ) and the General Court and the decisional practice of the European Commission.

The Dutch Authority for Consumers and Markets (ACM) has not developed any general guidelines or notices concerning the application of article 24 Mw (in contrast to other areas of competition law where the ACM has issued policy documents, including on horizontal cooperation agreements, leniency, merger notifications and remedies). The ACM relies on the EU Commission's Guidance on its enforcement priorities in applying article 102 TFEU to abusive exclusionary conduct by dominant undertakings (Guidance Paper).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

The Dutch Competition Act defines dominance as 'a position of economic strength enjoyed by one or more undertakings which enables them to prevent effective competition being maintained on the relevant market by giving them the power to behave to an appreciable extent independently of their competitors, suppliers, customers or end users.' The Dutch legislator thereby followed the ECJ's definition of dominance as established in *United Brands* (1978), only changing 'an undertaking' to 'one or more undertakings' to introduce the concept of collective dominance.

In assessing dominance, the Explanatory Memorandum lists a range of elements to be taken into account. First, the relevant product market and geographic market must be established, as the market structure will to a large extent determine an undertaking's dominance. Factors to be considered in this regard are the undertaking's market share in absolute terms, its market share relative to its competitors, its position as regards its suppliers and customers, and the extent to which it can determine its own prices and terms. Certain characteristics of the undertaking itself may be of relevance in assessing its dominance, such as access to technology, financial reserves (deep pockets), high capacity, resources, and/or essential facilities. Finally, the behaviour of the undertaking may be indicative of dominance, such as the ability to charge excessive prices.

In practice, the ACM and the Dutch courts generally follow the same approach as the European Commission and are willing to explore alternative methods to assess dominance.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

According to the Explanatory Memorandum, the main goal of the Dutch Competition Act, including article 24 Mw, is to protect competition by removing restrictions that have adverse economic effects.

Sector-specific regulations that contain additional provisions addressing dominance (see question 4) may introduce additional interests to be taken into account. For example, the Electricity Act includes obligations on producers and suppliers in the interest of protecting the environment, and the Postal Act imposes obligations on undertakings to ensure the quality of services.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Several sector-specific regulations contain rules that apply to undertakings with 'significant market power'. The definition of significant market power and the corresponding tests, for example, to define the relevant market, are applied in accordance with the principles as established under the Dutch Competition Act (see questions 2 and 9).

The sector-specific regulations are complementary to article 24 Mw and, subject to the regulation at issue, are enforced either by the ACM or by a sector-specific regulatory authority. As the sector-specific regulations do not prejudice the ACM's authority to apply article 24 Mw, the ACM has entered into cooperation guidelines with several regulators to coordinate their enforcement actions, including the Dutch Healthcare Authority (NZa) and the Dutch Media Authority.

The ACM's Telecommunications, Transport and Postal Services Department oversees the rules under the Telecommunications Act and the Postal Act that apply to undertakings with significant market power in the telecommunications sector and the postal sector. These acts allow the ACM to impose obligations on undertakings with significant market power, for example, concerning access to the market and in relation to certain prices and tariffs.

The ACM's Energy Department oversees the rules under the Electricity Act and Gas Act that apply to undertakings with significant market power in the electricity sector and the gas sector. These acts similarly allow the ACM to impose obligations concerning, for example, market access and tariffs.

The NZa enforces specific regulation addressing undertakings with significant market power in the healthcare sector. The NZa can take precautionary measures (under threat of a fine), even if abuse of market power has not been established. For example, in 2012 the NZa ordered a general practitioner collective to inform customers about all available pharmacies and not discriminate against online pharmacies. The Minister of Health, Welfare and Sport has announced a legislative proposal, under which the NZA's regulatory authority concerning undertakings with 'significant market power' would transfer to the

ACM. The ACM has created a special Healthcare Task Force to oversee the transition.

Finally, the Dutch Media Authority enforces the rules under the Media Act that apply to undertakings in the media sector, which includes a prohibition for public broadcasters to undertake ancillary activities that may distort competition.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Article 24 Mw applies to undertakings. The Dutch Competition Act defines the concept of undertaking by simple reference to Article 101 TFEU, while the Explanatory Memorandum incorporates the full definition as provided by the ECJ in *Höfner* (1991): 'every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.'

To determine whether an activity qualifies as 'economic' requires a case-by-case analysis. A public entity will be exempted from the provisions of the Dutch Competition Act when carrying out a public task but is subject to the prohibition of article 24 Mw to the extent it is engaged in an economic activity. In *Vereniging Eigen Huis* (2002), for example, the ACM found that the Dutch Competition Act did not apply to the municipality of Amsterdam's implementation of its social housing policy, which the ACM qualified as a public task, but that the municipality did qualify as an undertaking for purposes of article 24 Mw in relation to the sale of land, which the ACM considered to be an economic activity.

Similar to article 106(2) TFEU, article 25 Mw provides that the competition rules do not apply to undertakings entrusted by law or regulation with the operation of services of general economic interest if this would obstruct the performance of the particular tasks assigned to them.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The prohibition under article 24 Mw only applies to dominant undertakings, and does not extend to conduct of non-dominant companies attempting to become dominant. Dominance itself is also not prohibited.

Article 24(2) Mw explicitly provides that mergers are not caught by the prohibition. The Explanatory Memorandum further provides that a merger involving a dominant company that is not caught by the thresholds of the Dutch Competition Act is not covered by article 24 Mw either.

7 Collective dominance

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

Article 24 Mw also applies to collective dominance. The definition of dominance under the Dutch Competition Act specifically refers to 'a position of economic strength enjoyed by one or more undertakings'. The notion of collective dominance is interpreted in accordance with the European case law and decisional practice.

In *Brink's* (2014) the ACM rejected the complainant's claim that three banks were collectively dominant, in particular because the market structure did not allow tacit cooperation between the banks. On appeal, the District Court of Rotterdam (2015) confirmed the ACM's finding regarding the absence of collective dominance with reference to the *Airtours* criteria, which provide that:

- the market must be sufficiently transparent;
- there must be a retaliation mechanism; and
- the policy must be able to withstand the foreseeable reaction of existing and future competitors and consumers.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Article 24 Mw also applies to dominant purchasers and suppliers. In a 2004 'vision paper' that explains the ACM's approach to dominant purchasers, the ACM acknowledges the pro-competitive effects that may result from buyer power, for example where a purchaser secures lower prices and the corresponding benefits are passed on to consumers. Competition concerns may arise, however, if the dominant purchaser's conduct is aimed at foreclosing its competitors, or where the dominant purchaser is also dominant on a downstream market.

In *Brink's* (2014) the ACM rejected the complainant's claim that a joint purchasing organisation set up by banks to collectively acquire money transport services used its buyer power to demand excessively low prices. Referring to its 2004 vision paper, the ACM considered it likely that any benefits would be passed on to the bank's customers. The ACM's finding was confirmed on appeal by the District Court of Rotterdam (2015).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Markets are defined in accordance with the criteria that are applied in merger control cases, in which the ACM and the Dutch courts typically follow the approach that is applied in European case law and decisional practice.

In terms of market shares, the ACM follows the same thresholds that are applied at the European level. This means that a market share over 50 per cent creates a presumption of dominance, which can be rebutted only in exceptional circumstances. A market share above 40 per cent will require further investigation. In *Carglass* (2011), for example, the ACM decided to further investigate the alleged dominance of an undertaking with a market share over 40 per cent, and concluded that the undertaking was not dominant in light of low barriers to entry, strong buyer power from customers, and the relatively strong position of competitors. Undertakings with a market share under 40 per cent are typically not considered dominant.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

As with article 102 TFEU, the Dutch Competition Act does not contain any specific definition of the concept of abuse, though the Explanatory Memorandum refers to the same examples that are listed in article 102 TFEU: unfair prices, limiting production, discrimination and tying.

(The notion of abuse of dominance is interpreted in accordance with the European case law and decisional practice, which defines abuse as the behaviour of an undertaking in a dominant position that influences 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 that, through recourse to methods different from those that condition normal competition on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.)

The Explanatory Memorandum also explicitly provides that the prohibitions under the Dutch Competition Act, including article 24 Mw, follow an effects-based rather than a form-based approach. The legislation does not impose any per se prohibitions (although the ACM and the Dutch courts will be guided by the European case law and decisional practice in this regard), and the ACM is willing to conduct economic analyses in abuse of dominance cases. It accepts economic evidence and typically seeks advice from the in-house Chief Economist and from external economic advisors. The ACM typically also assesses the counterfactual (ie, how the market would have developed absent the conduct of the dominant undertaking), although in *GasTerra* (2011) it rejected the claim that it is obliged to do so.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The Explanatory Memorandum confirms that the concept of abuse covers both exploitative and exclusionary practices. In practice, the

ACM – like the European Commission – mainly focuses on exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

According to the Explanatory Memorandum, there is no need for a causal link between dominance and abuse, and conduct can also be abusive if it occurs on a market where the dominant undertaking has no market power. This has been confirmed by the ACM and the Dutch courts on several occasions.

In *CR Delta* (2003), for example, the ACM referred to the ECJ's judgment in *Tetra Pak* (1996) in concluding that the leveraging of a dominant position to offer rebates in a neighbouring market amounted to an abuse of dominance. And in *Equens* (2013), the District Court of Midden-Nederland found that Equens, which was dominant on the upstream market for the processing of credit card transactions, abused this position on the downstream market for 'acquiring' (an intermediary service connecting merchants to Equens' network). Equens was active on the downstream market through a subsidiary, and introduced a waiting period for connecting payment terminals to its network in case the merchant switched between different acquirers. The court found that the waiting period was not objectively justified, and only served to provide Equens' subsidiary with an opportunity to approach switching merchants with a better offer.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In accordance with European case law and decisional practice, the prohibition of article 24 Mw does not apply to conduct that is objectively justified (even if exclusionary intent is shown). A company invoking this defence must demonstrate that the conduct is necessary and proportionate in relation to the legitimate aim it pursues.

The right to protect one's commercial interests can be an objective justification. In *Cybermedia* (2008) the District Court of Utrecht accepted that Visa's and MasterCard's termination of a supply agreement was justified in light of the reputational damage they risked incurring by being associated with Cybermedia, which offered extreme pornographic content on its website.

Objective justifications may also be of a non-economic nature. In *ZLU v NPO* (2003) the ACM found that a restriction imposed by the Dutch association governing pigeon racing according to which its members could not participate in a foreign pigeon racing competition was justified because the rule pursued the legitimate aim of safeguarding the sporting interests.

In assessing whether conduct amounts to an abuse, the ACM may consider potential efficiency gains. In *CarGlass* (2003) the ACM took into account the fact that certain incremental rebates reflected the efficiency gains resulting from the economies of scale. And in a 2007 rapport investigating the potential anticompetitive nature of price discrimination by collecting societies, the ACM on its own initiative engaged economic consultants to determine the potential efficiencies of these schemes and the corresponding impact on consumer welfare.

Finally, dominant undertakings may successfully rely on a government compulsion defence. In *Stichting Registratie Gezelschapsdieren* (2000) the ACM rejected a complaint against a dominant undertaking which had refused a licence on the basis that the undertaking's conduct was required by law. The ACM quoted the ECJ's judgment in *Ladbrokes* (1997) in finding that the competition rules do not apply if 'anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework that itself eliminates any possibility of competitive activity on their part'.

Specific forms of abuse

14 Rebate schemes

In accordance with European case law and decisional practice, article 24 Mw prohibits rebate schemes that are exclusive, fidelity enhancing, or otherwise produce exclusionary effects. In *Carglass* (2003) the ACM confirmed that pure quantity rebates and incremental rebates are presumed not to have an exclusionary effect.

In *CR Delta* (2010) the Court of Appeal for Trade and Industry overturned a decision by the ACM in which it had fined a dominant undertaking for having implemented a fidelity-enhancing rebate scheme. The ACM had concluded, based inter alia on the General Court's judgment in *Michelin II* (2003), that the rebate could be presumed to be abusive based on the fidelity-enhancing nature of the scheme. The Court of Appeal for Trade and Industry acknowledged that the scheme was fidelity-enhancing but, relying on the ECJ's judgment in *Tomra* (2012), found that the ACM should have assessed whether the conduct was capable of having an anticompetitive effect.

This case exemplifies the difficulty that courts and regulators have in striking the right balance between applying a form-based and effects-based approach to certain types of abuses. The much anticipated ECJ judgment in *Intel* is expected to provide further guidance, at least in respect of rebate schemes. In his opinion (2016), Advocate General Wahl argues for a more effects-based approach.

15 Tying and bundling

Tying is among the examples of abuses listed by the Explanatory Memorandum. In *Apple* (2007) the ACM investigated a complaint by the Dutch consumer organisation alleging that Apple's pre-installation of iTunes on iPods amounted to an illegal tie. The ACM concluded that this was not the case, as neither the iPod nor iTunes were (at the time) exclusive: consumers were free to play music bought in iTunes on other devices, and could play music downloaded from other music stores on their iPod.

16 Exclusive dealing

While dominant undertakings are in principle free to decide with whom they deal, exclusive dealing may in certain instances amount to an abuse. In *Heineken v Royalty* (2002) the ACM confirmed that exclusive dealing by a dominant undertaking could amount to an abuse in the absence of an objective justification, referring inter alia to the ECJ's judgments in *Hoffmann La Roche* (1979) and *Akzo* (1991).

17 Predatory pricing

The ACM assesses predatory pricing by a dominant undertaking in accordance with the principal rules introduced by the ECJ in *Akzo* (1991): if prices are lower than average variable cost there is a strong presumption of predation, and if prices are lower than average total cost but above average variable cost the prices must be regarded as abusive if the anticompetitive intent of the dominant undertaking can be established. In line with the European Commission's Guidance Paper, the ACM uses the average avoidable cost and the long-run average incremental cost as benchmarks.

The ACM has applied this test in several cases. Most notably, the ACM confirmed in *Sandd* (2012) that prices imposed by incumbent PostNL were not predatory because they remained above the long-run average incremental cost. Sandd had claimed that PostNL's subsidiary competing with Sandd could offer its services below cost price because it could make free use of the network of PostNL. The ACM found that the costs associated with the excess network capacity of PostNL, which it had to maintain in the context of its universal service obligation, did not need to be attributed to the subsidiary for calculating its long-run average incremental cost.

On appeal, the District Court of Rotterdam (2013) rejected Sandd's argument that new entrants on the postal market could not operate as efficiently as PostNL, and that absent a level playing field the ACM therefore should not have used an 'as efficient' competitor test. Referring to the ECJ's judgment in *Post Danmark* (2012), the court considered that a less efficient competitor forcing a dominant undertaking to raise prices would not be in the interest of consumers.

18 Price or margin squeezes

Price and margin squeezes are a recurring theme in the telecommunications sector. The ACM has for example issued specific guidelines applying to undertakings with significant market power or a dominant position on the market for fixed-telephony and leased lines (2001). The guidelines focus on the margin between the wholesale tariffs for access

to telecommunication networks and the end-user tariff, which network operators can narrow to such an extent that equally efficient undertakings which depend on access to the network are no longer able to profitably offer their services.

19 Refusals to deal and denied access to essential facilities

Many article 24 Mw cases before the ACM and Dutch courts concern complaints about refusals to deal. As with other abuses, the ACM and the courts apply the tests as established in European case law and decisional practice.

The Supreme Court has confirmed that the cumulative criteria as established by the ECJ and summarised in the European Commission's Guidance Paper also apply to article 24 Mw. This means that a refusal to supply can only amount to an abuse if the product is objectively necessary to compete, if the refusal leads to the elimination of all competition, and if there is no objective justification for the conduct. In *NVM v HPC* (2014) the Supreme Court found that a refusal by the Dutch association for real estate agents to ensure interoperability between its software and that of HPC was not abusive, inter alia, because 20 per cent of all real estate agents were not member of the association, implying that the refusal could not eliminate all competition.

The restriction also applies to refusals to license intellectual property. In *Telegraaf* (2004) the Court of Appeal for Industry and Trade confirmed that, in light of the exclusive nature of intellectual property rights, the refusal to license intellectual property rights is abusive only in exceptional circumstances, referring inter alia to the ECJ's judgment in *Magill* (1995). During the proceedings the ECJ rendered its judgment in *IMS Health* (2004), confirming that a refusal to license intellectual property rights can only be abusive if it prevents the emergence of a new product. As the Telegraaf had merely shown that there was demand for its product, but could not demonstrate that it intended to create a new product, the Court of Appeal for Industry and Trade dismissed its request for a licence.

20 Predatory product design or a failure to disclose new technology

While there are no clear precedents on predatory product design or a failure to disclose a new technology in the Netherlands, it is worth noting that Dutch coffee producer Douwe Egberts was behind the complaint that resulted in the French competition authority's commitment decision in *Nespresso* (2014). Douwe Egberts had complained that Nestlé had implemented various practices that encouraged consumers to use only Nespresso-branded capsules in the popular Nespresso coffee machines, including through repeated modifications to the machine that made Douwe Egberts' competing capsules incompatible. Following an investigation by the French competition authority, Nestlé committed to lift these restrictions, though it continues its legal fight to protect its IPR. Given Douwe Egberts' prominent role in the matter, it is not unlikely that the dispute will also find its way to the Dutch courts.

21 Price discrimination

The ACM has confirmed that it can be abusive for an undertaking to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The ACM also investigated several discrimination claims, often finding that there is no case of abusive discrimination because the differential treatment was based on objective criteria.

In *Interpay* (2004), for example, the ACM rejected Superunie's claim that the rebates Interpay granted to Superunie's competitor Ahold were justified on the basis that Ahold was a 'first mover' that had invested significantly in the success of Interpay's payment product.

22 Exploitative prices or terms of supply

While the ACM has investigated several claims of excessive pricing by dominant undertakings, it is generally hesitant to interfere with an undertaking's pricing policy. In *GasTerra* (2011) the ACM indicated that it will only pursue excessive pricing abuse claims where prices charged by a dominant company do not reflect the underlying economic value of the product at issue.

In *AstraZeneca* (2014) the ACM investigated AstraZeneca's prices for a heartburn drug, which was sold outside hospitals (extramural) for a price that was 66 to 91 times higher than the price at which it was sold inside hospitals (intramural). The case was particularly interesting because of the alleged lock-in: the ACM investigated whether AstraZeneca offered the drug at predatory prices in hospitals in the knowledge that patients will typically continue using the drug outside the hospital, where it could then charge predatory prices. The ACM ultimately closed the investigation because the ACM could not establish that AstraZeneca was dominant.

The ACM has explored different methodologies to determine whether prices are excessive. In *Interpay* (2004) the ACM determined that prices were excessive on the basis of an economic formula that compared the 'return on capital investment' with the rate of return reflected in the 'weighted average cost of capital'. And in *Fresh FM* (2008) the ACM considered that an international comparison of rates charged in other countries may be a suitable benchmark.

In *KLM* (2007) the Court of Appeal for Trade and Industry confirmed that exploitative contractual terms other than prices may also amount to an abuse, referring to the ECJ's judgment in *United Brands* (1978). The court concluded that KLM's general terms and conditions that applied to passengers were in proportion with the economic value of the services rendered to the customers and therefore not abusive.

23 Abuse of administrative or government process

Abuse of administrative or government process may amount to an abuse only in exceptional circumstances. In *Chipsol* (2015) the Court of Appeal for Trade and Industry confirmed the ACM's finding that the use of legal proceedings can be deemed abuse only if it is aimed at harassing a competitor and in an effort to eliminate competition, referring to the General Court's judgment in *ITT Promedia* (1998).

24 Mergers and acquisitions as exclusionary practices

Mergers are not covered by article 24 Mw, irrespective of whether they meet the merger thresholds (see question 6).

25 Other abuses

The ACM has investigated several complaints concerning allegedly abusive conduct that does not necessarily fit in one of the categories described above. For example, in *Pretium Telecom* (2003), the ACM considered that the use by a dominant undertaking of customer data for marketing purposes could in certain circumstances amount to an abuse, in particular in circumstances where the undertaking has access to information that it can use in a neighbouring market and that is not available to its competitors on that market. The ACM rejected the complaint, however, on the basis that KPN had only approached former customers that had recently switched to a competitor, which the ACM considered normal market behaviour.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Authority for Consumers and Markets (ACM) is responsible for enforcing article 24 Mw. Under article 35(1) of Regulation 1/2003, the ACM and the Dutch courts have the authority to apply article 102 TFEU to conduct that may affect trade between member states. The ACM was formed in April 2013 as a result of the merger between the Dutch Competition Authority (NMa) with the Dutch Consumer Authority and the Independent Post and Telecommunications Authority. In this chapter, references to the ACM will include references to the NMa as its predecessor responsible for enforcing the Dutch competition rules.

The ACM may examine infringements of article 24 Mw ex officio or on the basis of a complaint. As detailed in a 2016 notice, in setting its priorities the ACM will primarily assess the extent of consumer harm, the general interest and whether it believes it can effectively solve the problem. In recent years, the ACM has declined to investigate a range of abuse of dominance complaints with reference to its discretionary priority policy.

The ACM's powers of investigation include the power to request information, access documentation, seal premises and search premises and vehicles. Subject to court approval, the ACM may also search private homes. Subjects of an ACM investigation have a duty to cooperate,

although the ACM has to respect the right against self-incrimination and legal privilege.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The fines that the ACM may impose for competition law infringements have increased as a result of a legislative change that entered into force in July 2016. The ACM may impose fines of up to €900,000 or 10 per cent of the undertaking's total worldwide turnover in the preceding business year, whichever is greater. The ACM's 2014 fining guidelines (which have recently been amended to reflect the recent legislative change) explain the methodology the ACM follows when setting a fine. The key parameters in setting a fine are the relevant turnover, the gravity and duration of the infringement, and any aggravating or mitigating circumstances. In case of recidivism, the ACM may increase the maximum fine by 100 per cent.

The highest fine the ACM has imposed to date for an article 24 Mw infringement was €30.2 million in *Interpay* (2004), although the fine was annulled on administrative appeal.

The ACM may also impose injunctions subject to periodic penalty payments, which can be in the form of a structural remedy within the meaning of article 7 of Regulation 1/2003 if necessary to bring an infringement to an end.

The ACM may also fine individuals who ordered the infringement or had a leading role in the infringement. The fine will in part depend on the turnover of the company and is subject to a maximum of €900,000. While the ACM has not yet fined individuals for their involvement in a violation of article 24 Mw to date, it regularly imposes fines on individuals involved in cartel infringements.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The ACM can impose sanctions directly. Like the European Commission, the ACM acts simultaneously as investigator, prosecutor, jury and sentencing judge. While the ACM uses Chinese walls separating the case team that carries out the investigation from the legal service, which is responsible for drafting the decision and determining the fine, the ACM's Board is ultimately responsible for the entire procedure.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The ACM has a notoriously poor track record in enforcing article 24 Mw. It declines to investigate most complaints on the basis that it does not consider them to be a priority, and rejects most of the claims that it does decide to investigate. The ACM adopted only a few infringement decisions over the past decade, most of which were either annulled on administrative appeal or by the courts.

The only noteworthy decision in the past five years concerns the ACM's commitment decision in *Buma/Stemra* (2014). Following an investigation into the online exploitation of music rights, the Dutch collecting societies agreed to modify their procedures to make it easier for right holders to seek an exemption from the collecting societies' standard exploitation services. The ACM does not need to establish an infringement in a commitment decision, and it was therefore sufficient for the ACM to conclude that the commitments removed the risks that the collecting societies' existing procedures could cause to competition. This decision fits in with the ACM's strategy to resolve cases with alternative enforcement tools: the ACM increasingly addresses potential competition issues through formal or informal commitments and remedies.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Unlike for violations of article 6 Mw (the Dutch equivalent of article 101 TFEU), the Dutch Competition Act does not provide that a finding of an abuse of dominance leads to the invalidity of the agreement. Under the Dutch Civil Code, however, any contractual term that violates a binding legal provision or that is contrary to public order is null and void. A clause in an contract that violates article 24 Mw will therefore likely be considered null and void.

In general, Dutch law provides for partial nullity. To what extent a finding that a particular clause violates article 24 Mw would affect the enforceability of the remainder of the contract will therefore depend on the circumstances of the case.

Update and trends

The ACM is not expected to step up its article 24 Mw enforcement efforts. Responding to criticism on its poor track record in article 24 Mw investigations, the ACM has explained that it often prefers to use 'alternative enforcement tools', including by handling cases 'informally', behind closed doors. In *Mastercard* (2014), for example, the ACM decided not to open a formal investigation after receiving unilateral informal commitments. While this is highly unsatisfactory from a legal certainty perspective, and risks undermining the ACM's credibility by being perceived as a regulator with no teeth, it is expected that the ACM will continue to rely on these alternative enforcement tools in the coming years.

If, however, the ACM does come to an infringement decision in the near term, it is not unlikely that it will also fine individuals responsible for the conduct, as the ACM already frequently does in cartel infringements. This would be the first time an individual would be fined for an abuse of dominance investigation.

In terms of sector-specific enforcement, the ACM is expected to focus on a number of sectors in particular. In the transport sector, the ACM has opened an informal sector inquiry into the port of Rotterdam, and has an ongoing abuse of dominance investigation concerning ECT, a container terminal operator. The ACM also has an ongoing investigation against the NS, the national railway service. In the telecommunications sector, the ACM is expected to closely monitor the market developments following the recent merger between Vodafone and Ziggo.

As regards the healthcare sector, a recent legislative proposal to transfer certain regulatory powers from the NZa to the ACM, which was expected to enter into force in January 2017, has been postponed until further notice. In light of the national elections in 2017, no immediate changes to the legislation are expected in the near future.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Article 24 Mw is directly enforceable in civil proceedings. Dutch courts can invalidate agreements, grant temporary and permanent injunctions (eg, to order a dominant firm to grant access, supply goods or services, or conclude a contract) and award damages.

Partly as a result of the ACM's poor enforcement record in article 24 Mw, many plaintiffs opt for bringing an abuse of dominance claim before a Dutch court rather than approaching the ACM. For example, in *KPN v nl.tree* (2003) the District Court of the Hague granted a temporary injunction ordering KPN to withdraw offers for internet access at prices below cost (although the injunction was annulled in the substantive proceedings).

The ACM may intervene as amicus curiae in civil proceedings to opine on issues concerning article 102 TFEU (but not article 24 Mw), either at its own initiative or at the request of the court or the parties to the proceeding. Despite having developed amicus curiae guidelines in 2004 (which have in the meantime expired), the ACM intervenes only sporadically: the ACM's intervention in *Kia Motors Nederland* (2009) is the only publicly known example, while the ACM has rejected a number of requests to intervene.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

A company harmed by the abusive conduct of a dominant undertaking can claim damages in civil court proceedings. Damage claims are subject to the general civil law rules on tort. Dutch law only provides for compensatory damages and does not award punitive damages.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

An ACM decision finding an abuse may be appealed to the ACM itself. The ACM will take advice from a special advisory committee before delivering a decision on appeal. There are several examples where the ACM's decision on appeal overturned an article 24 Mw infringement decision, including in high-profile cases such as *Interpay* (2005) and *GasTerra* (2011).

The ACM's decision on appeal may be appealed to the District Court of Rotterdam. Parties subject to an infringement decision may also agree with the ACM to skip the administrative appeal procedure and appeal the initial decision directly to the District Court of Rotterdam. A ruling by the District Court of Rotterdam may in turn be appealed to the Court of Appeal for Trade and Industry. Both courts may review the facts and the law, and can refer the case back to the ACM and order it to take a new decision.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

There are no specific competition rules addressing the unilateral conduct of non-dominant firms. The Explanatory Memorandum explicitly states that the interpretation and application of the Dutch Competition Act should neither be more stringent nor more lenient than the European competition rules.

And while the Explanatory Memorandum acknowledges the need to establish a robust national competition policy and decisional practice, in practice the ACM and the courts tend to rely heavily on the European case law and decisional practice, often citing them extensively in their decisions.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Pursuant to national competition law the behaviour of dominant firms is governed by section 11 of the Competition Act of 5 March 2004 No. 12 (CA), which prohibits 'any abuse by one or more undertaking of a dominant position', no prior decision to that effect being required. Section 11 CA mirrors article 102 of the Treaty on the Functioning of the European Union (TFEU) and article 54 of the Agreement on the European Economic Area (EEA). It follows from Norwegian case law that the case of the European Court of Justice, the General Court, the European Commission, the EFTA Court and the EFTA Surveillance Authority (ESA) related to these provisions is relevant when enforcing section 11 CA. If the conduct in question affects trade between the EEA or EFTA states or several European Union (EU) states, article 54 EEA and article 102 TFEU apply in parallel with section 11 CA.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Section 11 CA is phrased in the same way as article 102 TFEU. Thus there is no direct definition of dominance in the CA. According to case law under article 102, this implies that the decisive factor is the power to behave to an appreciable extent independently of consumers and competitors, see the United Brands case and subsequent EU case law. The Norwegian Supreme Court held in Tine (2011), Rt-2011-910, in premise 64, that for the application of section 11 CA the assessment of whether the undertaking holds a dominant position must be assessed in light of the EU and EEA law. The elements to be taken into account when assessing dominance would therefore mirror those elements included in an assessment under article 102 TFEU and article 54 EEA.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The object of the CA is primarily economic and related to overall efficiency and consumer welfare. The CA does, however, contain two provisions enshrining other public interests: Firstly, section 13 CA empowers the King (ie, the government), in 'cases involving public principles or interests of major significance', to permit conduct that is prohibited by section 11 CA. This provision was never used and in 2016 the Norwegian parliament decided to repeal it. Section 13 will hence cease to apply from the time the enactment enters into force (which remains to be decided). Secondly, in order to enhance competition in certain markets, the government (King in Council) may, by regulation, pursuant to section 14 CA intervene against terms and conditions, agreements or practices that restrict or are liable to restrict competition in contrast to the general purpose of the CA. There is only one regulation in force based on this provision, imposing online housing advertising companies to grant access on non-discriminatory terms.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The CA is of general application and applies in parallel to sector-specific legislation. In relation to electronic communications (including, inter alia, telecoms), special legislation applies through the Electronic Communication Act of 4 July 2003 No. 83. This Act implements the EU directives relating to electronic communications. Chapter 3 of the Electronic Communication Act contains provisions governing firms having 'significant market power'. The definition of significant market power is akin to the definition of dominance (compare section 3-1) and a firm holding such a position shall be made subject to one or more of the special obligations set out in Chapter 4 of the Act. These obligations are, in general, concerned with access to facilities and non-discrimination. Further, the relevant authority can, under special circumstances, issue orders beyond the obligations contained in Chapter 4. Other sector-specific legislation contains provisions that, although of a general application, are relevant primarily for dominant firms. In particular, this is true for the Energy Act of 29 June 1990 No. 50 and the Postal Act of 29 November 1996 No. 73.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Section 11 CA applies to 'undertakings'. This concept has the same meaning as under article 54 EEA and article 102 TFEU. Thus, every entity engaged in economic activity regardless of the legal status of the entity must comply with the provision. Section 11 CA also applies to public entities to the extent that they engage in economic activities, namely, that are 'undertakings'. There are no legal exemptions from the general prohibition of section 11. However, the concept of objective justification is applied in the same manner as within the EU and EEA law.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

In the same manner as under article 102 TFEU and article 54 EEA abuse is a separate condition for applicability of section 11 CA, so neither dominance per se nor the creation of dominance is prohibited per se. The creation of a dominant position may however fall under the rules on merger control of the CA. Moreover, arrangements that create dominance may, depending on the circumstances specific to the case, be prohibited by section 10 on anticompetitive agreements and practices (mirroring article 101 TFEU and article 53 EEA).

7 Collective dominance

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

Section 11 CA applies to collective dominance. Neither the CA nor Norwegian case law provides for a definition of collective dominance. The preparatory works of the CA explains that the requirements of collective dominance have not been fully clarified through EU case law. There are no cases under section 11 in which collective dominance has been found to exist, but the analysis would mirror that under article 102 TFEU and article 54 EEA.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

As with article 102 TFEU, section 11 CA applies to dominant purchasers. There are no cases from Norway concerning this but it can be presumed that a certain degree of market power downstream is required before upstream abusive behaviour will be at risk of being investigated.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The relevant product and geographic markets are defined in the same manner as under article 102 TFEU and article 54 EEA. There is no specific market share threshold and the question of dominance must be assessed on a case-by-case basis, but certain market share thresholds would normally imply a presumption for dominance. EU guidance is relevant also in this relation and as set forth as a general point of departure in the European Commission's guidance paper on article 102 TFEU, dominance is not likely if the undertaking's market share is below 40 per cent in the relevant market. There are no cases under section 11 CA in which collective dominance is found to exist, but the analysis would mirror that under article 102 TFEU and article 54 EEA.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Section 11 CA is drafted in line with article 102 TFEU, namely, it includes a non-exhaustive list of possible abuses that are identical to the list of possible abuses under article 102 TFEU and article 54 EEA. In the *Tine* case from 2011, the Norwegian Supreme Court confirmed that the notion of abuse in section 11 CA mirrors that of article 54 EEA/102 TFEU.

In the assessment of whether an activity constitutes abuse, the purpose of the CA, namely to ensure economic efficiency and consumer welfare, is of the utmost importance. Moreover, as under the EU and the EEA rules it is clear that the concept of abuse is an objective one. No case law from Norway establish a particular conduct as subject to a per se prohibition, but the interpretation of section 11 CA mirrors that of article 102 TFEU and article 54 EEA, and will follow relevant developments on this point.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Also in relation to this question, the case law related to the application of article 102 TFEU and article 54 EEA offers important guidance. Consequently, dominance, abuse and potential economic benefit do not necessarily need to occur in the same market. Furthermore, the Norwegian Competition Authority (NCA) in its guidelines holds that showing a link between dominance and abuse is no requirement (eg, a dominant undertaking if entering into an exclusive purchasing agreement could abuse its position even though its dominant position in itself was irrelevant for closing that agreement).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

It is possible to invoke efficiency gains. Moreover, although not expressed in section 11 CA (as article 102 TFEU), it is possible to defend an allegedly abusive practice on the basis that the conduct in question is necessary to protect legitimate interests (objective justification and proportionality). If exclusionary intent is shown, it appears that such defences cannot be relied upon, see the NCA's decision V2007-2, *Tine v NCA*, page 81.

Specific forms of abuse

14 Rebate schemes

Rebate schemes could be considered as abusive pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA. One of the few cases investigated under section 11 CA concerned a rebate scheme operated by a dominant bus company. The Authority first condemned the scheme as abusive in Decision V2004-29 but then quashed its own decision after the bus company had filed an appeal (Decision V2004-34). The NCA generally holds that incremental rebates that encourage consumer loyalty may be prohibited if competitors are driven, entirely or in part, out of the market and such rebates cannot be objectively justified by the dominant undertaking. Retroactive rebates are mentioned by the NCA as an example of such abuse.

15 Tying and bundling

Tying and bundling could be considered as abuses pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA.

16 Exclusive dealing

Exclusive dealing, etc, could be considered as abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA.

17 Predatory pricing

Predatory pricing could be considered as an abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA. One of the NCA's landmark cases under section 11 CA – the *SAS* case of 2005 – was a predatory pricing case related to certain domestic air travel routes in Norway where the NCA's decision was quashed by the courts. In the *SAS* case the NCA applied the test from *AKZO v Commission* as cost benchmark. There is no Norwegian case law that clarifies whether recoupment is a necessary element in the assessment of predatory pricing, but the NCA will follow the case law on the interpretation of article 102 TFEU and article 54 EEA. The possibilities of recoupment would presumably form part of the NCA's assessment on predatory pricing, although it appears unsettled on the basis of the *SAS* case whether this is a separate requirement.

18 Price or margin squeezes

Price or margin squeezes could be considered as an abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA. In 2016 the ESA issued a statement of objections against Telenor ASA related to (among other things) possible illegal margin squeeze of competitors in respect of the provision of retail mobile telephony services. An oral hearing was held in late 2016 and a decision from the Surveillance Authority is expected in 2017.

19 Refusals to deal and denied access to essential facilities

Refusal to deal could be considered as an abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA. There are no such cases from the NCA. However, the SA has dealt with several cases related to exclusivity. In 2010 the company Posten Norge AS was fined approximately €13 million for exclusive arrangements excluding competitors in the domestic parcel delivery market. The decision was upheld on substance by the EFTA Court. In 2011, the ESA fined Color Line AS and Color Group AS approximately €19 million related to an abuse in the form of maintaining long-term exclusive rights to access the harbour in Strömstad, Sweden.

20 Predatory product design or a failure to disclose new technology

Predatory product design or a failure to disclose new technology could be considered as abuses pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA. There are no cases regarding this from the NCA.

21 Price discrimination

Price discrimination could be considered as an abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA.

22 Exploitative prices or terms of supply

Exploitative prices could be considered as an abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA. Pursuant to section 2 of the Act Relating to Price Policy (The Price Policy Act), it is forbidden to receive, demand or agree upon prices that are unfair for the purchasing party. In practice, allegations of unfair pricing based on the Pricing Policy Act have rarely been successful in the courts. Contrary to section 11 CA, however, section 2 of the Pricing Policy Act does not require that an undertaking holds a dominant position.

23 Abuse of administrative or government process

Abuse of government processes could be considered as an abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA.

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are covered by the CA's provisions on merger control, and generally not considered as an abuse pursuant to section 11 CA. In principle, however, mergers and acquisitions could be considered as an abuse pursuant to section 11 CA, namely, such behaviour would be prohibited to the same extent as under article 102 TFEU and article 54 EEA,

25 Other abuses

Other types of abuse pursuant to section 11 CA would follow the abuse concept as enshrined in article 102 TFEU and article 54 EEA.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Enforcement is carried out by the Norwegian competition authorities, which are the King (ie, the Council of Ministers), the Ministry of Trade, Industry and Fisheries and the Norwegian Competition Authority (NCA). In practice the NCA is main enforcer in Norway. In addition, the ESA can enforce article 54 EEA.

The powers of investigation conferred upon the NCA are set out in Chapter 6 of the CA. Pursuant to section 24, everybody is obliged to provide the NCA with the requested information in respect of a suspected breach of section 11 CA. Moreover, the NCA can, on the basis of section 25 CA, carry out on-the-spot surprise investigations with a view to securing evidence on business premises or other places where relevant information may be found. Prior consent from the District Court is required to this effect. The Authority can require police assistance when it carries out such surprise investigation. The investigatory powers correspond roughly with those of the European Commission under Council Regulation (EC) No. 1/2003.

National courts have the power to enforce section 11 CA in relation to private litigation and decisions by the competition authorities can be challenged before the courts. Decisions by the NCA imposing a fine for abuse of dominant position may not be appealed to the Ministry, but is brought directly before the courts, which then may examine and consider all aspects of the case.

In 2016 the CA was amended by the introduction of a specific complaints board for competition cases (Konkurranseklagenemnda). The amendment has not yet entered into force. Somewhat simplified, the complaints board will be the exclusive appeals body for all decisions by the NCA. The decisions of the complaints board can be brought before Gulating Appeals Court.

Update and trends

The main change in Norwegian competition law is the new complaint board for competition cases, which is scheduled to begin functioning in 2017. When the NCA's decisions are being reviewed by a specialist panel on appeal there may be a risk that a subsequent judicial appeal to the Appeals Court will in practice focus on form and procedure, without an in-depth review of the substance of the case. This may have implications for the role economic considerations are ultimately given in competition cases in Norway.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The basic remedy is to require the abusive practice to be brought to an end, see section 12 CA. In addition to behavioural remedies, this may involve structural remedies provided that there are no behavioural remedies equally effective or if such remedies would be more burdensome on the company. Structural remedies have not yet been imposed.

According to section 29 CA, the NCA may also issue an administrative fine provided that the abusive practice was carried out with negligence or intent. The NCA imposed fines in the SAS and Tine cases, however, these decisions were annulled on appeal and no final fines has yet been imposed in other section 11 cases. The principles for calculating fines for violations of the CA are in line with the principles for calculating fines under the EEA and EU competition rules. Accordingly, fines may amount to up to 10 per cent of the worldwide turnover of the undertaking. However, this is a maximum limit and the level of the fine will be determined on a case-by-case basis.

Infringement of section 11 CA does not trigger criminal sanctions. However, such sanctions are available in respect of anticompetitive agreements violating section 10 CA. Moreover, failure to comply with decisions by the NCA or the obligation to provide information to the NCA and the provision of incomplete or incorrect information can result in criminal sanctions being imposed.

The ESA has imposed fines in two major cases being the *Posten Norge* case (2010) (approximately €11 million) and the *Color Line* case (2013) (approximately €19 million).

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Competition Authority may pursuant to section 29 CA issue administrative fines directly. Criminal sanctions must be decided by a court (or by way of the undertaking in question accepting a fine proposed by the public prosecutor). As mentioned above, violations of section 11 CA are in themselves not subject to criminal sanctions.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Section 11 CA has been infrequently enforced and the NCA has not taken any section 11 decisions in the past few years. After its adoption

in 2004, the ambition of the NCA was to enforce the provision in more than one case annually. However, this ambition has not been met.

After its adoption, the NCA has adopted two landmark section 11 decisions – the *SAS* case regarding predatory pricing in the air transport industry in 2005 and the *Tine* case relating to exclusionary practices in the dairy sector in 2011. The *SAS* case was settled during appeals proceedings and the Tine decision was quashed by the courts. A few cases are currently under investigation, but the NCA has not adopted a final decision in any section 11 cases after the *Tine* case of 2011.

Currently the NCA and the ESA are investigating two cases against Telenor ASA relating to alleged abuse of dominance in the Norwegian telecoms market. These two cases are currently the most high-profile ongoing dominance cases in Norway.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

As under article 102 TFEU and article 54 EEA, contracts are void as far as they are in breach of section 11 CA. Thus, if it is possible to separate the illegal provisions from the remaining terms, the latter will be valid and enforceable. The assessment of partial vs total invalidity is a matter of general Norwegian contract law.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private parties can make complaints to the NCA, requesting that an allegedly abusive practice is brought to an end. The NCA must state its reasons when refusing to issue such an order (see section 12 of the Act). Rejections may be appealed to the Ministry (and, when it enters into function, the new complaint board for competition cases described above). Further, it is possible to initiate private enforcement actions before national courts in order to compel a dominant firm to grant access, supply goods or services, or conclude a contract.

The Norwegian Patent Act contains a provision that empowers the NCA to grant compulsory licenses based on a substantive assessment that for all practical purposes corresponds to that applied pursuant to section 11 CA. This provision is rarely relied upon in practice.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices can claim damages (economic loss). This is executed by way of general court proceedings if an out-of-court settlement cannot be reached. Class actions are possible according to Chapter 35 of the Civil Procedure Act.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The authority decisions finding an abuse may be appealed, and the District Court may examine and consider all aspects of the case – both facts and law. As mentioned above, the CA was amended in 2016 and a new appellate body – the Konkurranseklagenemnda will be established presumably in 2017 to handle all complaints against decisions by the NCA, including in dominance cases. After the new complaint board has started functioning the district courts will no longer review appeals against NCA decisions in abuse cases. Decisions from the complaint board may subsequently be appealed to Gulating Court of Appeal in Bergen.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Norway is not part of the EU. Nevertheless, the substantive scope of section 11 CA mirrors article 102 TFEU and article 54 EEA. There are no rules applying to the unilateral conduct of non-dominant firms.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The Portuguese Constitution (article 81) lists the following among the general principles of economic organisation and as primary duties of the state:

- ensuring the efficient functioning of the market to guarantee balanced competition between undertakings;
- opposing monopolistic forms of organisation;
- pursuing abuses of dominant position and other practices that may harm the general interest; and
- guaranteeing the protection of the interests and rights of the consumer.

The Constitution has evolved from the original 1976 version to reflect the various (indeed, somewhat conflicting) political, social and economic concerns of the legislature. That said, the principles referred to above, along with the recognition of private property, private enterprise and consumer protection, show that competition is seen as an essential element of the Portuguese economic system.

The Portuguese competition regime went through a significant reform in 2012 with the adoption of a new Competition Act, Law No. 19/2012 of 8 May (the Act), which superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (the former Competition Act).

The Act largely follows the rules established at EU level, and addresses agreements between undertakings, decisions of associations of undertakings and undertakings' concerted practices, as well as the abuse of a dominant position, the abuse of economic dependence, concentrations and state aid. The Act also includes the leniency regime for immunity or reduction of fines imposed for breach of competition rules, which was formerly set forth in a separate statute (Law No. 39/2006 of 25 August 2003).

Decree-Law No. 125/2014 of 18 August 2014 adopted and approved the new statutes of the Competition Authority (the Authority), superseding Decree Law No. 10/2003 of 18 January 2003, which created the Authority (which replaced the Directorate General for Trade and Competition and the Competition Council, the administrative entities formerly entrusted with the enforcement of competition law) and approved its former statutes.

As regards appeals, Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court), which was established in the town of Santarém, effective from 30 March 2012. The Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Competition Authority.

Also relevant are:

- the general regime on quasi-criminal minor offences (enacted by Decree-Law No. 433/82 of 27 October 1982), which applies, on a subsidiary basis, to the administrative procedure on anticompetitive agreements, decisions and practices, and to the judicial review of sanctioning decisions;
- the Penal Code and the Code of Criminal Procedure, both applying on a subsidiary basis to quasi-criminal minor offences, by virtue of the general regime on quasi-criminal minor offences; and
- the Civil Code and the Code of Civil Procedure, regarding civil liability for anticompetitive infringements.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 11 of the Act, contrary to article 6 of the former Competition Act, does not include a definition of dominance. In establishing dominance the Authority follows EU case law as well as its past practice under the former competition regimes.

The Authority, in its last decision regarding an abuse of dominant position – *Associacao Nacional de Farmacias (ANF)* (December 2015) – invoking *United Brands* (case 27/76, 1978) and *Hoffmann-La Roche* (case 85/76, 1979), states that 'holding a dominant position corresponds to detaining substantial market power' which occurs when a company 'is able to raise prices up to a supracompetitive level, in a lasting and profitable way, without the fear of losing clients. That only happens when it is not subject to effective competitive pressure'. And the Authority, in line with its past understanding and practice, restated in the same decision the full convergence between national and EU competition law as regards the concept of dominant position.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the legislation and the underlying dominance standard seems to be economic insofar as the Act does not mention any specific interests to be protected by the prevention and prosecution of abuses of a dominant position.

Nevertheless, article 81(f) of the Constitution (see question 1) specifically mentions 'the general interest' as a value to be protected against abuses of a dominant position.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The Act's provisions, including those on dominance, apply to all economic activities taking place in the Portuguese market or having effects therein, be they permanent or occasional, in the private, public and cooperative sectors, as per article 2 of the Act.

Sector regulators are entrusted with the generic power to ensure effective competition in the corresponding regulated markets. For instance, in the specific case of telecoms, according to Law No. 5/2004 of 10 February 2004, as amended, the sector regulator, the National Communications Authority, may declare which companies, if any, have significant market power, and impose duties on them, such as transparency, non-discrimination in access to interconnection, accounting separation, and price control and cost accounting (article 66). It should, nevertheless, be noted that the above powers do not include those of establishing or pursuing abuses of a dominant position under article 11 of the Act.

Dominance issues related to merger control may also be subject to specific rules in what concerns the intervention of sector regulators, for example, in the insurance, banking and media sectors.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The notion of an 'undertaking' adopted in the Act is very broad, in line with EU case law. It covers any entity exercising an economic activity that involves the supply of goods and services in a particular market, irrespective of its legal status or the way it operates in the private, public and cooperative sectors.

Under the Act, as in the former Competition Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, as long as the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The Act only provides for the behaviour of firms that are already dominant. The Act does not take issue with an undertaking becoming dominant or attempting to become dominant.

The acquisition or reinforcement of a dominant position, as a result of a concentration may, however, be scrutinised under the rules in the Act regarding merger control (articles 36 to 59 of the Act).

7 Collective dominance

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

Yes. Both article 102 TFEU and article 11 (1) of the Act provide for the prohibition of abuses committed by one or more companies. As noted above (see question 2), the Act does not include a definition of dominance but the Authority follows EU case law and the Commission's approach, also in what refers to the findings of collective dominance. See DG Competition discussion paper on the application of article 82 of the Treaty to exclusionary abuses (December 2005), points 43-50.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Yes. The Act applies to dominant purchasers. Although none of the decisions on abuse of dominant position so far adopted by the Authority concern dominant purchasers, there should be no differences in the application of the law to dominant suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

According the Authority's decision practice, the Authority follows in its methodology of definition of the relevant markets the 'Commission Notice on the definition of relevant market for the purposes of Community competition law' (Official Journal C372, 9 December 1997). The relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. The relevant geographic market comprises the area in which the undertakings concerned supply their products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas (see the *Sport TV Portugal* decision referred to in question 29).

The Act does not rely on market-share thresholds to establish dominance.

While very high market shares may constitute an indication of a dominant position notably when competitors hold much smaller market shares (see, eg, *Hoffmann-La Roche*, case 85/76, 1979; *AKZO*, C-62/86, 1991), such conclusion does not follow necessarily, a number of other factors having to be taken into account in the corresponding assessment. In Portugal, the Authority also seems not to grant a decisive importance to the size of the market share in determining the existence of dominance or lack thereof.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article 11(1) of the Act does not give an express legal definition of abuse. It states that 'the abusive exploitation, by one or more undertakings, of a dominant position in the national market or a substantial part of it is prohibited.' It is, therefore, an open clause, with a potentially broad scope of application.

Nonetheless, article 11(2) of the Act gives examples of abusive practices, as follows:

- directly or indirectly fixing purchase or sale prices or other unfair trading conditions (article 11(2)(a));
- limiting production, distribution or technical development to the prejudice of consumers (article 11(2)(b));
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (article 11(2)(c));
- making the signing of contracts conditional on the acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts (article 11(2)(d)); and
- refusing to provide, upon appropriate remuneration, access to an essential network or other essential infrastructures controlled by the dominant undertaking to any other undertaking, when without such access this latter undertaking cannot, for factual or legal reasons, compete with the dominant undertaking in the upstream or downstream markets, unless the dominant undertaking demonstrates that, for operational or other reasons, the access is reasonably impossible (article 11(2)(e)).

At the EU level, despite the criticism that used to be made that both the Commission and the EU Courts had a very formalistic approach to article 102, it is undeniable that the Commission has for some time expressly adopted an effects-based approach (see Guidance on the Commission's enforcement priorities in applying article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009)), as to which the Commission stated its 'determination to prioritise those cases where the exclusionary conduct of a dominant undertaking is liable to have harmful effects on consumers' (Commission Press Release IP/08/1877, 3 December 2008). The EU Courts have also increasingly adopted an effects-based approach (see, eg, decisions in cases *Deutsche Telekom* (C-280/08) and *Telia Sonera* (C-52/09), in which the European Court of Justice considered that potential competitive effects must be found for a margin squeeze may be punished). The Authority, which follows as a rule, at least in theory, the positions of the Commission and the case law of the EU Courts, is in line with the evolution detected. For example, in its last decision on abuse of dominance, the Authority tried to detect effects on the market concerned in order to declare unlawful an alleged margin squeeze by the ANF Group on the market for studies based on pharmacies' data (see question 18).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The examples mentioned in article 11(2) of the Act include examples of both exploitative and exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Under the competition regime in place prior to the former Competition Act, there was considerable debate on whether a causal link had to be established between the dominant position and the abuse. In a 1996 statement, the Competition Council (one of the former competition authorities) seemed to consider that such a test had to be met, although more recent decisions showed some dissension within the Council on that subject.

In the 1995 *Multifrota* case, the Competition Council decided that a company that was dominant in the tachograph equipment market was abusively taking advantage of that position in order to get better results in the market for tachograph paper, a market where it was not dominant. This type of approach has been followed by the Authority in subsequent cases.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In principle, defences based on objective justifications (such as objective necessity or meeting competition) or efficiencies may be discussed under the Act, which, as stated, closely follows article 102 TFEU. If exclusionary intent is shown it shall be more problematic to raise defences particularly because the burden of proof for such an objective justification or efficiency defence remains with the dominant company.

Specific forms of abuse

14 Rebate schemes

Rebate schemes may be caught under the open clause of article 11(1) of the Act. In addition, article 11(2)(c) of the Act prohibits the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. Although retroactive rebates are more likely to have foreclosure effects, any rebate scheme, particularly its economic effect, must be assessed on a case-by-case basis. It cannot be excluded that an incremental rebate scheme may be considered anticompetitive having into account its specific circumstances. The decision of the former Competition Council in *Martini* (1987) sanctioned the application of a discriminatory rebate scheme to certain classes of customers.

15 Tying and bundling

Article 11(2)(d) of the Act prohibits making the signing of contracts conditional on the acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

In *Via Verde* (2002), the former Competition Council decided that the service under discussion – the issuing of receipts to users – and the identification and prosecution of infringers on the automatic toll payment of the Lisbon bridges involved tying; the provider of the service of automatic toll payment was subsequently fined for abuse of a dominant position.

16 Exclusive dealing

Exclusive dealing issues may be caught by the general prohibition of abusive exploitation of a dominant position in the national market established in article 11(1) of the Act. Former Competition Council decisions concerning these issues include:

- *Moraes & Wasteels* (1987) on the exclusive purchase obligation and purchase-price fixing regarding certain train tickets for groups of students or emigrant workers supplied by Wasteels Expresso to national travel agencies;
- *Luso* (1987) regarding market partitioning between distributors of the same brand which results from the existence of price lists and freight bonuses that rendered the purchase prices equal, coupled with recommended retail prices followed in practice by all the distributors, thereby eliminating any motivation for the search of alternative sources of supply, even for passive sales, by potential buyers; and
- *Tabaqueira I* (1988) concerning the imposition of an exclusive purchase obligation on tobacco wholesalers, which resulted, it was found, from an abuse of the negotiating strength that Tabaqueira's market power granted to it, closing the market to actual or potential competitors.

17 Predatory pricing

Article 11(2)(a) of the Act applies to predatory pricing. The decision of the former Competition Council in *RAR* (1988), concerning a sugar refiner and packager, punished predatory pricing in the packed sugar market. RAR was punished for abusing its dominant position in the market of white sugar in bulk by using it and putting into practice a price reduction in the white sugar in sachets market having as a consequence affecting the economic balance of its competitors packaging companies.

18 Price or margin squeezes

Article 11(2)(a) and (c) of the Act should apply to price or margin squeezes. In the decision adopted in *Portugal Telecom* (PT the then telecoms incumbent) Group/ZON Group (2009), the Authority punished the PT Group and the ZON Group for margin squeeze. In addition, in the decision in *National Association of Pharmacies (ANF)* (2015) the Authority also fined the ANF and its affiliated companies for alleged margin squeeze. In this latter case, for example, the Authority found an abuse of dominant position through a margin squeeze by the ANF Group to the extent the price imposed by the latter regarding pharmacies' data upstream when compared with the prices imposed by the Group in the downstream market for the studies based on pharmacies' data did not permit an equally efficient competitor to obtain a margin sufficient to cover the remaining production costs.

19 Refusals to deal and denied access to essential facilities

Article 11(2)(e) of the Act expressly outlaws the refusal to facilitate access to a network or to essential facilities. The decision of the former Competition Council in *Auto-Sueco* (1995) stated that the dominant importer of heavy lorries abusively tried to prevent an operator in a downstream market (urban waste disposal vehicles) from entering the market by refusing to deal with it.

Further, one of the decisions so far adopted by the Authority regarding the abuse of a dominant position concerns the refusal, by PT Comunicações (PTC), a Portugal Telecom subsidiary, to grant access to its underground conduits network, which is considered an essential facility by PTC's competitors TvTel and Cabovisão. Nonetheless, the Lisbon Court of Commerce annulled this condemning decision, based on the Authority's failure to provide sufficient proof that there had been an unjustified or discriminatory refusal of access to an essential facility. The annulment was subsequently confirmed by the Appellate Court of Lisbon.

20 Predatory product design or a failure to disclose new technology

Theoretically and depending on the facts at issue it is conceivable that the open clause of article 11(1) of the Act may apply to predatory product design or a failure to disclose new technology.

21 Price discrimination

Article 11(2)(c) of the Act refers to the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. The Authority's decisions in *PT Comunicações* (2008) and in *PT Group/ZON Group* (2009) punished, respectively, PT Comunicações and PT Group and ZON Group for discriminatory conditions regarding equivalent services. Likewise, in the *Sport TV* decision (2013) the practice in question was the consistent application of discriminatory conditions to equivalent transactions (the system of remuneration in agreements for distribution of the Sport TV Portugal channels).

Outside the context of the Act, special legislation governing unilateral commercial practices (Decree-Law No. 166/2013 of 27 December 2013), prohibits, among other practices, discriminatory prices or other sales conditions between undertakings, with respect to equivalent transactions, when such discrimination does not have a cost justification or

does not result from 'practices in conformity with Competition Law'. In this respect, it should be noted that the authority in charge of the enforcement of this statute is the Food and Economic Safety Authority, which, lacking the required expertise, oddly enough, may be called to apply competition rules and principles.

22 Exploitative prices or terms of supply

The open clause of article 11(1) of the Act excludes any forms of exploitation, including exploitive prices or terms of supply. The decision of the former Competition Council in *Tabaqueira II* (1997) punished discriminatory minimum purchase obligations under the competition regime in force before the former Competition Act. In this decision the former Competition Council concluded that for entities with a dominant position in the market the imposition of minimum acquisition quantities that progressively leads to the reinforcement of the quantities at issue and the removal of the players in that or other markets amounts to an abusive behaviour.

23 Abuse of administrative or government process

Although there is no known case in Portugal of an investigation of abuse by misuse of administrative or government process, it cannot be excluded that article 11(1) of the Act may apply to such cases.

In terms of judicial procedure, specific provisions apply in the case of bad faith litigation, which comprises the abuse of judicial procedure, where fines are applied by the court and damages awarded when proved by the other party.

24 Mergers and acquisitions as exclusionary practices

Mergers may be scrutinised by the Authority under the merger control provisions of the Act, and a merger shall be prohibited if it creates significant impediments to effective competition in the Portuguese market or in a substantial part of it, in particular if such impediments result from the creation or strengthening of a dominant position.

There is no known case in Portugal in which mergers or acquisitions have been investigated as abuses.

25 Other abuses

As stated above, article 11(1) of the Act constitutes an open clause with a potentially broad scope of application. Accordingly, types of abuse not covered by the previous questions may theoretically be sanctioned under the Act.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The responsibility for enforcing the competition regime rests with the Competition Authority.

The Authority is a public entity endowed with administrative and financial autonomy, which has been granted statutory independence to perform its activities, without prejudice to the competence of the government as regards competition policy.

The Authority has extensive powers of investigation and inspection. Among other powers, it can, notably:

- question the concerned undertaking and other persons involved, personally or through their legal representatives, and request from them documents and other data deemed convenient or necessary to clarify the facts;
- question any other persons, personally or through their legal representatives, whose statements are considered relevant, and request from them documents and other data;
- carry out searches, examinations, collection and seizure of extracts from accounting records or other documentation at the premises, lands or transportation means of the undertakings or associations of undertakings (this action requires a decision from the competent judicial authority, a judge or the public attorney, issued upon an Authority's substantiated application);
- during the period strictly required for the foregoing measures, seal the premises and locations of the undertakings or associations of undertakings where accounting records or other documentation, as well as supporting equipment, may be found or are likely to be found (this action requires a decision from the competent judicial authority, a judge or the public attorney issued upon an Authority's substantiated application); and
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the Authority's functions.

If there are reasonable suspicions that in the domicile of shareholders, members of the board of directors or employees of undertakings or associations of undertakings there is evidence of serious infringements to the provisions of the Act on restrictive practices or abuses of dominant position, or to articles 101 or 102 TFEU, domicile searches may be carried out by the Authority if previously authorised by a judge upon request from the Authority. If the search is carried out in an attorney-at-law's office or in a doctor's office it must be made, otherwise being null, in the presence of a judge who previously informs the president of the local section of the Bar Association or of the Doctors' Association, as applicable, so that this latter may be present or indicate a representative to be present.

The proceedings carried out by the Authority after it has opened an inquiry must ensure that the parties involved are given a hearing and comply with the other principles of the adversarial system.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Abuse of dominance is considered a quasi-criminal minor offence. The application of general criminal law can only derive from behaviour also corresponding to a penal offence (fraud, extortion, etc) since there are no criminal sanctions for competition law offences.

In relation to sanctions for quasi-criminal minor offences, fines can be imposed of up to 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings:

- for infringements of article 11 of the Act or article 102 TFEU;
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase;
- for the non-compliance with behavioural or structural remedies imposed by the Authority; or
- for non-compliance with a decision ordering interim measures.

The Authority published Guidelines on the methodology to use in the application of fines, dated 7 August 2012, according to which the Authority takes into account the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates (similarly to the European Commission's Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003 (2006/C 210/02)), or the total turnover when the calculation of the turnover related to the infringement is impossible to determine.

In the case of any of these infringements being carried out by individuals held responsible under the Act the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, the refusal to provide information or the provision of false, inaccurate or incomplete information, or non-cooperation with the Authority are subject to fines of up to 1 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority, for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings. In the case of any of these infringements being carried out by individuals held responsible under the Act the applicable fine ranges from 10 to 50 units of account (each unit of account at present amounting to €102).

Further, the absence of a complainant, of a witness or of an expert to a duly notified procedural act is punishable with a fine ranging from 2 to 10 units of account.

Additionally, should the infringement be considered sufficiently serious, the Authority can impose, as ancillary sanctions, the publication, at the offender's expense, of an extract of the sanctioning decision

in the Official Gazette and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market, or, in the case of competition law infringements carried out during, or because of, public procurement proceedings, the prohibition for a maximum of two years from participating in proceedings for entering into public works contracts for concessions of public works or public services for the lease or acquisition of goods or services by the state or for the granting of public licences or authorisations.

The Authority may further impose periodic penalty payments of up to 5 per cent of the average daily turnover in the year immediately preceding that of the final decision, per day of delay, counted from the date established in the notification, where the undertakings do not comply with an Authority decision imposing a sanction or ordering the adoption of certain measures.

Individuals, legal persons (regardless of the regularity of their incorporation), companies and associations without legal personality may be held liable for offences under the Act.

Legal persons and equivalent entities are liable when the acts are carried out on their behalf, on their account by persons holding leading positions (eg, the members of the corporate bodies and representatives of the legal entity), or by individuals acting under the authority of such persons by virtue of the violation of surveillance or control duties. Merger, demerger or transformation of the legal entity does not extinguish its liability.

The members of the board of directors of the legal entities, as well as the individuals responsible for the direction or surveillance of the area of activity in which an infringement is carried out are also liable when holding leading positions they act on behalf or on the account of the legal entity, or knowing or having the obligation to know the infringement they do not adopt the measures required to put an end to it, unless a more serious sanction may be imposed by other legal provision.

Undertakings whose representatives were, at the time of the infringement, members of the directive bodies of an association that is subject to a fine or a periodic penalty payment are jointly and severally responsible for paying the fine, unless they have expressed in writing their opposition to the infringement.

Further, the Authority's decisions declaring the existence of a restrictive practice may include the admonition or the application of other fines and other sanctions set forth in the Act and, if required, the imposition of behavioural or structural remedies indispensable to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy that is equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

In addition, the Authority may, at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition, or indispensable to the effectiveness of the final decision to be adopted, if the findings indicate that the practice in question is about to cause serious damage, irreparable or difficult to repair damage. The interim measures may be adopted by the Authority ex officio or upon request by any interested party and shall be effective until they are revoked and for a period of up to 90 days, extendable for equal periods within the time limits of the proceedings. Imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such a hearing puts at risk the effectiveness of the measures, in which case the concerned undertaking is heard after the measure is adopted. Whenever a market subject to sectoral regulation is concerned, the opinion of the corresponding sectoral regulator shall be requested.

As noted above, the Authority has published Guidelines on the methodology to use in the application of fines. In drafting these guidelines the Authority has taken into account the European Commission's Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003, also referred to above. While the Authority's guidelines largely reflect those adopted by the European Commission in respect of the method for the setting of fines, they include, nevertheless, specific provisions resulting from the application of the general regime on quasi-criminal minor offences, which applies, on a subsidiary basis, to the administrative procedure on anticompetitive agreements, decisions and practices (see question 1). For instance, where the economic benefit obtained from the infringement may be established and exceeds the maximum limit of the applicable fine the Authority may impose a fine up to such benefit as long as the applicable fine does not exceed the said maximum limit by more than a third; in the case of several infringements, the applicable fine cannot exceed the double of the higher limit applicable to the infringements at issue; in the case of negligence, the amount of the applicable fine is reduced by half.

The highest fine ever imposed was the one levied on the PT Group and the ZON Group, in which the Authority fined the said groups an aggregate amount of €53.062 million (€45.016 million on the PT Group and €8.046 million on the ZON Group), for abuse of a dominant position between 22 May 2002 and 30 June 2003 in the wholesale and retail broadband access markets. The sanctioned abusive practices included retail margin squeeze, discriminatory conditions regarding equivalent services and limiting production, distribution, technical development and investment in respect of the services concerned. This decision was revoked by the Lisbon Court of Commerce on 4 October 2011, which, on the grounds of the applicable statute of limitations acquitted the defendants.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Competition enforcers impose sanctions directly (see questions 26 and 27).

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

Under both the former Competition Act and the Act, and although several investigations into reported abuses of dominance have been carried out or are at present under way, only seven condemning decisions have so far been adopted by the Authority.

The first three cases involved the Portugal Telecom (PT) Group, the then telecoms incumbent in Portugal: in the first case in 2007, the Authority fined PT Comunicações, a subsidiary of Portugal Telecom, €38 million for refusal of access to its underground conduits network to competitors Tvtel and Cabovisão, a decision that was annulled by the Lisbon Court of Commerce on 2 March 2010, this annulment having been confirmed by the Appellate Court of Lisbon. The second decision fined PT Comunicações €2.1 million in 2008 for abuse of a dominant position in the wholesale markets for the lease of communication circuits, a decision that was revoked by the Lisbon Court of Commerce on 29 February 2012, which acquitted PT. The Authority appealed this latter decision to the Appellate Court of Lisbon, but in any case the statute of limitations has meanwhile expired. The third decision fined the PT Group and the ZON Group an aggregate amount of €53.062 million (with a €45.016 million fine on the PT Group and a €8.046 million fine on the ZON Group) for abuse of a dominant position between 22 May 2002 and 30 June 2003 in the wholesale and retail broadband access markets, a decision that was revoked by the Lisbon Court of Commerce on 4 October 2011, which acquitted the defendants.

In addition, on 12 April 2012, the Authority imposed on Roche Farmacêutica, a local subsidiary of Roche, a fine of €900,000 for abuse of a dominant position related to a discount system applied by Roche to public hospitals within public tenders proceedings in 2006.

Further, in a decision announced on 18 May 2010, the Authority fined the Portuguese Association of Chartered Accountants (OTOC) €229,300 for adopting anticompetitive practices in the market of mandatory training for chartered accountants, a decision that was partially confirmed by the Lisbon Court of Commerce, which lowered the fine to €90,000. A subsequent appeal has been lodged by the OTOC with the Appellate Court of Lisbon, which confirmed the Lisbon Court of Commerce's decision.

Subsequently, on 20 June 2013, the Authority imposed on Sport TV Portugal a fine of €3.73 million for abuse of a dominant position in the national market for television channels of conditioned access with premium sport content, a fine that the Competition, Regulation and Supervision Court (the Specialised Court) decreased to €2.7 million. This latter decision has been confirmed by the Appellate Court of Lisbon.

Finally, in a decision announced on 31 December 2015, the Authority imposed on the National Association of Pharmacies (ANF) and on three companies of the same group (Farminveste SGPS, Farminveste – Investimentos, Participações, Gestão, SA and HMR – Health Market

Update and trends

Transposition of Directive 2014/104/EU
Following the adoption of Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Damages Directive) a draft legislation has been subject to public discussion in 2016. Such legislation is forthcoming but is yet to be enacted, although the deadline to transpose such Directive already expired on 27 December 2016.

The new legislation is expected to be enacted in 2017 and to foster the development of private antitrust litigation in Portugal.

Most recent decision on abuse of dominant position
In a decision announced on 31 December 2015, the Authority imposed on the National Association of Pharmacies (ANF) and on three companies of the same group (Farminveste SGPS, Farminveste – Investimentos, Participações, Gestão, SA and HMR – Health Market Research, Lda) a fine in the aggregate amount of €10.34 million for abuse of dominant position (margin squeeze) on the market for studies based on pharmacies' data.

According to the Competition Authority the ANF group is active in both the market for sale of pharmacies' commercial data, through Farminveste - Investimentos, Participações, Gestão, SA and, since 2009, in the market for production of studies based on such data, following the incorporation of Health Market Research, Lda.

The Authority has considered that the ANF Group used its dominant position in the market for pharmacies' commercial data to implement a margin squeeze in the downstream market for studies based on pharmacies' commercial data, to the extent that the price imposed by the ANF Group regarding pharmacies' data upstream, when compared with the prices imposed by the Group in the downstream market for the studies based on pharmacies' data did not permit an equally efficient competitor to obtain a margin sufficient to cover the remaining production costs.

Following an appeal lodged by ANF, the Competition, Regulation and Supervision Court lowered the fine to circa €7 million, a decision that ANF appealed to the Appellate Court of Lisbon.

Research, Lda) a fine in the aggregate amount of €10.34 million for abuse of dominant position (margin squeeze) on the market for studies based on pharmacies' data. Following an appeal lodged by ANF the Specialised Court lowered the fine to circa €7 million a decision that ANF appealed to the Appellate Court of Lisbon.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Contractual clauses that substantiate or have as an effect practices prohibited by the Act are null and void as a result of their being contrary to the law, according to article 280(1) of the Civil Code. In principle, this merely involves the nullity of the specific clause in the contract and not of the whole contract, unless, as per article 292 of the Civil Code, it is proved that the parties would not have entered into the contract without the invalid clause.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

As a preliminary remark, it should be pointed out that the answer to this question as well the answers to questions 32 and 33 hereunder are based on the current Portuguese rules set out in the Portuguese Civil Code and in the Civil Procedure Code. Legislation enacting Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Antitrust Damages Directive) is yet to be enacted (a draft legislation having been subject to public discussion in 2016), although the deadline to implement such Directive has already expired on 27 December 2016.

Third-party claims for damages are currently dealt with under the general principles and provisions applicable to civil liability as provided for in the Civil Code. Standard liability requirements are the existence of unlawful conduct (the abusive behaviour), injury to the claimant and a causal link between the two. The purpose of this liability is merely to repair damage, and, therefore, there is no award of punitive damages.

Any injured party has individual standing. Class actions, whereby individual litigants or associations may, under certain conditions, sue in representation of injured parties, are provided for in Law No. 83/95 of 31 August 1995, and article 31 of the Code of Civil Procedure, and may, in principle, be applicable to competition law injuries.

As for the possibility of a dominant firm being ordered to grant access, supply goods or services or conclude a contract, as stated in question 27, the Authority's decisions declaring the existence of a restrictive practice may include the admonition or the application of other fines and other sanctions set forth in the Act and, if required, the imposition of behavioural or structural remedies to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy that is equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy. As regards courts, although they may adopt decisions whereby a party is ordered to refrain from practices prohibited by law, such as an abuse, we are of the opinion that, under the Portuguese legal system, within the framework of the Act they cannot impose obligations on a specific contract.

As stated above (see question 30) contractual clauses that substantiate or have as an effect practices prohibited by the Act are null and void as a result of their being contrary to the law, according to article 280(1) of the Civil Code. This nullity may be declared ex officio by the Court.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Claims are adjudicated by the courts. The award of damages aims at restoring the situation that would have existed if the event that determines the need for the reparation had not occurred. The amount of compensation shall be measured by the difference between the actual patrimonial situation of the damaged party and the patrimonial situation of such party that would exist if the damage had not taken place. This includes not only the amount of the damage caused by the illicit conduct, but also interest and the amount of any benefits that the damaged party could not obtain due to the illicit action. Predictable future damage shall be taken into account for this purpose. Undeterminable future damage, on the contrary, shall be the object of a subsequent procedure and decision.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Law No. 46/2011 of 24 June determined the creation of the Specialised Court to handle competition, regulation and supervision matters, as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Authority.

Under the current regime, the Authority's sanctioning decisions (typically involving anti-competitive agreements, decisions and practices, abuses of economic power and infringements of the merger control rules) may be appealed to the Specialised Court under the rules established in the Act and, on a subsidiary basis, under the quasi-criminal minor offences regime. The appeal shall not suspend the effects of the Authority's decision, except for decisions that impose structural remedies as established in the Act. Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions only if the party concerned requests it on the basis of the allegation that the enforcement of the decision may cause it considerable harm and if such party offers a guarantee, and provided such guarantee is submitted within the time limit set by the court. The Specialised

Court shall have full jurisdiction in the case of appeals lodged against decisions imposing a fine or a periodic penalty payment, and can reduce or increase the corresponding amounts.

Appeals of decisions of the Specialised Court that may be appealed are filed with the Appellate Court of Lisbon as a court of last resort.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Unilateral anticompetitive behaviour by both dominant and non-dominant undertakings is taken into account in cases of an 'abuse of economic dependence'. Article 12 of the Act prohibits the abusive exploitation by one or more undertakings of the economic dependence on them by any suppliers or clients owing to the absence of an equivalent alternative, insofar as it affects the market functioning or the structure of the competition.

An equivalent alternative is considered not to exist when:

- the supply of the goods or services in question, notably the distribution service, can only be provided by a restricted number of undertakings; or
- an undertaking cannot obtain identical conditions from other trading parties within a reasonable time frame.

The following may be considered abusive:

- carrying out any of the practices mentioned in article 11(2) (a) (b) (c) and (d) of the Act (corresponding to behaviour that may amount to abusive practices, see question 15); and
- partial or total termination of an established commercial relationship without justification, taking into account past commercial relationships, the accepted trade usages in the concerned sector of economic activity and the applicable contract terms.

In addition, as stated above (see question 21) there is special legislation governing unilateral commercial practices (Decree-Law No. 166/2013 of 27 December 2013), dealing with unfair competition practices such as price and non-price discrimination, sale below cost and refusal to sell.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The behaviour of dominant firms is covered by:

- Federal Law No. 135-FZ on Protection of Competition dated 26 July 2006 (the Competition Law);
- Federal Law No. 147-FZ on Natural Monopolies dated 17 August 1995;
- sector-specific federal laws (eg, Federal Law No. 35-FZ on Electricity Energy dated 26 March 2003);
- governmental decrees on non-discriminative access to certain markets or goods or both; and
- regulations and guidelines of the Federal Antimonopoly Service (FAS) and the Central Bank of Russia (CBR).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 5 of the Competition Law defines dominance as the ability of a business entity or a group of business entities to exercise decisive influence on the general conditions of circulation of goods on a respective market or to remove other business entities from the respective market or to create obstacles for entry of other business entities to the respective market.

The main element which is taken into account when assessing dominance is market share of a business entity:

- a business entity with a market share exceeding 50 per cent is considered dominant, unless FAS determines that the business entity is not dominant on the respective market regardless of its market share;
- a business entity with a market share not exceeding 50 per cent is not considered dominant per se. To establish its dominance, FAS needs to prove additional circumstances (eg, stability of its market share, its relation to the market shares of its competitors, possibility for new competitors to enter the market); and
- if the market share of a business entity does not exceed 35 per cent, it cannot be found dominant, unless it is found collectively dominant (see question 7) or unless otherwise prescribed by the law.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the legislation and the dominance standard is economic. Its main objective is to prevent dominant undertakings from limiting or eliminating competition, violating business interests of other enterprises or interests of an unrestricted range of customers.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are sector-specific dominance rules, eg, for river and sea ports, electrical energy, communications and financial institutions. For example, a business entity is considered dominant on the electrical energy market if either of the following conditions apply:

- the share of capacity of its generating equipment or share of electrical energy generated with use of this equipment within the boundaries of the zone of free flow exceeds 20 per cent; or
- a business entity purchases or consumes more than 20 per cent of electical energy or capacity, or both, within the boundaries of the respective zone of free flow.

However, an entity that satisfies these criteria may nonetheless be found non-dominant.

A credit institution may be found dominant if both of the following conditions are met:

- the share of a credit institution on one market in the Russian Federation exceeds 10 per cent or its share on the market of goods which circulate on other markets in the Russian Federation exceeds 20 per cent; and
- the share of a credit institution during a lengthy term (generally, for more than a year) increases or permanently exceeds 10 per cent on one market in the Russian Federation or 20 per cent on the market of goods that circulate on other markets in the Russian Federation.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules apply to business entities. A business entity is a commercial organisation, a non-commercial organisation performing entrepreneurial activities, an individual entrepreneur or an individual rendering professional activities on the basis of state registration or licence or membership in a self-regulating organisation from which he or she earns income. Persons that are not business entities are exempt from dominance rules.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Russian legislation generally prohibits anticompetitive behaviour of all business entities, including conclusion of anticompetitive agreements (which may lead to its participants becoming dominant on the market) and unfair competition. However, Russian legislation specifically prohibits abuse of dominance by dominant firms.

7 Collective dominance

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

Collective dominance is covered by Russian legislation. Business entities may be deemed collectively dominant if they satisfy all of the following conditions:

- aggregate market share of not more than three business entities with biggest market shares exceeds 50 per cent, or aggregate market share of not more than five business entities with biggest market shares exceeds 70 per cent provided that market share of each of respective business entities exceeds 8 per cent;
- during a lengthy time period (generally, more than a year) market shares of the business entities remain permanent or subject to non-material changes and access to respective market of new competitors is hindered; and
- goods sold or purchased by the business entities cannot be substituted by other goods, an increase of prices for goods does not lead to a related decrease of demand for such goods, the information on price and terms of sale or purchase of such goods is available to indefinite range of persons.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

While Russian legislation generally applies equally to dominant purchasers and dominant suppliers, certain aspects of dominance (eg, abuse of dominance by unjustified reduction or termination of production of goods or unjustified refusal to contract with certain customers) apply only to dominant suppliers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Relevant product and geographic markets are defined in the same way as for merger control cases. FAS determines a product market on the basis of consumer or seller polls on interchangeability of goods falling within one product group. The determination of a geographic market is based on information on the region where a business entity is operating, pricing on the market and differences in price levels for these goods in the Russian Federation and on the structure of the flow of goods. During this process, FAS takes into account requirements of transportation and related costs, specifics of territories, business customs, etc, and results of consumer or seller polls.

For market share thresholds, see questions 2 and 7.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Abuse of dominance is defined as acts (or omissions) of a dominant entity which result or may result in the prevention, elimination or restriction of competition or infringement of rights of other business entities in the sphere of their entrepreneurial activities or unrestricted range of consumers. Russian legislation on abuse of dominance follows an effects-based approach, as it requires a negative effect on competition or third parties to determine the existence of a violation.

The list of acts (omissions) qualified as abuse of dominance is not exhaustive, but it names certain violations that are per se considered as abuse of dominance. Such acts include, in particular:

- fixing of monopoly high or monopoly low prices;
- withdrawal of goods from circulation if it results in an increase of prices for such goods;
- imposition of contractual conditions unprofitable for a counterparty or not related to the subject matter of an agreement;
- economically or technologically unjustified reduction or termination of the production of goods;
- economically or technologically unjustified refusal to deal with certain customers;
- economically, technologically or otherwise unjustified setting of different prices for the same goods;
- fixing of unreasonably high or low prices for a financial service;
- discrimination;
- creating barriers for the access to a market or withdrawal from a market for other business entities;
- breach of regulatory prescribed pricing rules; and
- manipulation of prices on wholesale and/or retail markets of electrical energy (capacity).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

When deciding an abuse of dominance case, FAS shall prove that a business entity is dominant on the market and committed actions qualified as abuse of dominance. Dominance per se is not qualified as an antitrust violation.

A conduct of a business entity may be qualified as abuse of dominance if it occurred on the dominated market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

A business entity may raise the following defences to allegations of abuse of dominance:

- a business entity is not dominant on the market: FAS determined the product and geographic market wrongfully or made a mistake in calculation of a business entity's market share;
- a business entity's acts (omissions) were economically and technically justified and cannot be qualified as abuse of dominance; and
- a business entity's acts (omissions) are permissible if they collectively meet the following conditions:
  - they do not give an opportunity to a dominant entity to eliminate competition on the market;
  - they do not impose restrictions on third parties which are not consistent with purposes of such acts (omissions); and
  - they result in an improvement of production, sale of goods and promotion of technical or economic progress or increase of competitive abilities of Russian goods on the world market and in receipt of comparable benefits by customers.

However, this defence cannot be used for certain types of abuse of dominance, including price fixing, withdrawal of goods from circulation, imposition of unprofitable contract terms on a counterparty, unjustified refusal to contract with certain counterparties, setting different prices for the same goods, price fixing for financial services; breach of regulatory prescribed pricing.

Defences are an option for both exclusionary and exploitative intent.

Specific forms of abuse

14 Rebate schemes

Use of rebate schemes (both retroactive and incremental rebates) is not prohibited per se. However, such schemes may fall under the prohibition of setting different prices for the same goods and the prohibition of discrimination. This may be the case if:

- conditions for granting a rebate are not transparent (eg, a business entity does not have a policy listing such conditions available for its counterparties);

- granting of a rebate is not based on objective criteria (eg, on the purchase volume, payment conditions, duration of cooperation); or
- criteria for granting a rebate are not formulated precisely.

15 Tying and bundling

Tying and bundling are qualified as abuse of dominance under Russian law and are prohibited. These practices include, among others:

- imposition of economically or technologically unjustified contractual terms or terms that are not provided by statutes or regulations;
- requirements to transfer monetary funds or other property (including proprietary rights); and
- bundling of execution of agreements with the acquisition of other goods in which a counterparty is not interested (eg, bundling purchase of compulsory insurance policy with one voluntary insurance policy).

16 Exclusive dealing

Exclusive dealing is not prohibited by Russian law per se. However, it may qualify as abuse of dominance if such practice leads to an economically and technologically unjustified refusal to contract with other potential partners. See question 19 for more details.

17 Predatory pricing

Fixing monopoly low prices is qualified as an abuse of dominance. A monopoly low price is defined as a price lower than the expenses and income required for the production and sale of goods and lower than the price on a comparable competitive market in Russia or abroad. A monopoly low price is determined on the basis of the following benchmarks:

- expenses required for the production and sale of goods;
- range of sellers and purchasers on the market; and
- terms of circulation of goods on the market, including taxation and tariff regulation.

Recoupment is a necessary element in the qualification of prices as monopoly low.

18 Price or margin squeezes

Price or margin squeezes may be qualified as the creation of hurdles to access the market or exit the market or as fixing a monopoly low price. See question 17 for more details.

19 Refusals to deal and denied access to essential facilities

Refusal to deal may be qualified as an abuse of dominance if it is economically and technologically unjustified. FAS has clarified that dominant entities are recommended to publish commercial policies on their websites describing the criteria for the selection of business partners and the selection process. The criteria of counterparty selection should be exhaustive and non-arbitrary and may, inter alia, include anti-corruption requirements. The selection process should be transparent for distributors, provide for particular terms for each step of the process and comprehensive documentation.

Denied access to essential facilities is one of the aspects of refusal to deal. It is specifically regulated for natural monopolies and for dominant entities with market share exceeding 70 per cent.

Natural monopolies are obliged to grant access to their services and facilities on a non-discriminatory basis. To ensure this the government adopts respective rules of non-discriminatory access, which, in particular, determine customers that should be satisfied in the first line and the conditions of access to the facilities (including technical requirements) as well as material conditions of agreements with customers or standard forms of such agreements. For example, such rules exist for electric energy, electro-communication networks, oil pipelines, airports, etc.

If a dominant entity with a market share exceeding 70 per cent abuses dominance, the government or the CBR are entitled to adopt similar rules of non-discriminatory access. However, neither the government nor the CBR has exercised this authority yet.

20 Predatory product design or a failure to disclose new technology

Prohibitions on abuse of dominance do not apply to the exercise of intellectual property rights. Thus, predatory product design and failure to disclose new technology will not qualify as abuse of dominance.

21 Price discrimination

On price discrimination see question 14. In addition, FAS specifically stressed that setting different prices for the same goods for subsidiaries and independent entities is unjustified and qualifies as an abuse of dominance.

Price discrimination is also covered by specific industrial regulations. For example, business entities selling food through retail chains or supplying food to retail chains are prohibited from discrimination of their counterparties (including in price terms), irrespective of their dominant position according to article 13 of Federal Law No. 381-FZ on Basics of State Regulation of Trade in the Russian Federation dated 28 December 2009. Discrimination is determined in the same way as for dominant entities.

Prevention of price discrimination is also achieved by direct price regulation of sale of certain goods or provision of services (eg, for certain services of natural monopolies).

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply may be qualified as abuse of dominance by imposition of unprofitable terms on a counterparty. Examples of such practices, as clarified by FAS, include the requirement for distributors to provide detailed supply estimates, the right of a dominant entity to terminate cooperation with a distributor based on mere suspicions regarding potential contractual violations, the absence of fixed terms for the payment of distributors' bills, the obligation to pass an audit on compliance with the laws of foreign jurisdictions, etc.

Besides, abuse of dominance by setting exploitative prices is covered by the prohibition to set monopoly high and monopoly low prices. For monopoly low prices please refer to question 17. Monopoly high prices are defined on the basis of the same benchmarks.

23 Abuse of administrative or government process

Abuse of administrative or government process generally is not qualified as abuse of dominance. However, such practices may qualify as an abuse of rights and may lead to the refusal of law enforcement authorities to apply remedies sought by dominant entities and to possible claims of other market players to compensate their damages.

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are not subject to the abuse of dominance regulation. However, their effect on competition will be evaluated by FAS if a transaction is subject to antitrust clearance. If a merger or acquisition leads or may lead to restriction of competition (including strengthening of a dominant position), FAS may deny clearance of the transaction.

25 Other abuses

Other abuses covered by Russian legislation include:

- withdrawal of goods from circulation if it results in an increase of prices for such goods;
- economically or technologically unjustified reduction or termination of the production of goods;
- breach of regulatory prescribed pricing rules; and
- manipulation of prices on wholesale or retail markets of electricity energy (capacity) or both.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

FAS is responsible for the enforcement of the dominance rules. It is authorised to:

- commence and consider antitrust violation cases;
- issue warning and compliance orders to dominance entities;
- impose administrative penalties on dominant entities and their officers; and
- carry out scheduled and extraordinary inspections of dominant entities.

In the framework of these authorities, FAS may request documents from legal entities, public bodies and individuals, access and view premises, review documents and objects, question persons which may have information relevant for the case being considered, attract experts and order expert reviews.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

FAS may:

- issue compliance orders to dominant entities requiring them to stop abusive practices or to conclude, amend or terminate contractual arrangements to eliminate an antitrust violation;
- issue a compliance order to dominant entities requiring that they transfer all income received as a result of the abuse of dominance to the public budget;
- apply to court for an order to split up a dominant entity if it is systematically engaged in monopolistic activities;
- apply to court for the invalidation of a transaction which violates antitrust legislation; and
- impose fixed fines up to 1 million roubles or turnover fines up to 15/100 of an enterprise's revenue on the respective market.

Officers of a business entity may be fined for up to 50,000 roubles or may be suspended for up to three years.

The highest fine imposed in the Russian Federation for an abuse of dominance reached 4,675,983,472 roubles. It was imposed on a leading oil company for withdrawal of goods from circulation and discrimination.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

FAS may impose most of sanctions directly (including issuance of compliance orders and imposition of administrative fines, including turnover-based fines). However, it must petition a court in order to split up a dominant entity, suspend company officers, or invalidate a transaction violating antitrust legislation.

Update and trends

FAS plans to remove the limitation that antitrust prohibitions do not apply to the exercise of rights over IP and to agreements in respect of IP. If adopted, unjustified refusal to conclude a licence agreement or reduction or termination of production of goods with use of respective IP (eg, a patent) may be considered as abuse of dominance. Compulsory licences can be used as a remedy.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The rules on abuse of dominance are enforced quite often in the Russian Federation, with FAS annually commencing approximately 3,000 cases. The most commonly prosecuted forms of abuse include breach of pricing regulations, unjustified refusal to deal, unjustified reduction or termination of production and imposition of unprofitable contractual terms on a counterparty. Among the industries that are affected the most are heat and electricity supply, and housing and utility infrastructure.

The average length of abuse of dominance proceedings is five months. In certain cases, this term may be extended, and the overall proceedings may take up to approximately 14 months.

The most recent high-profile abuse of dominance case was the case against Google considered and decided by FAS and courts in 2015–2016. Google was found dominant on the market for application stores for Android OS. It abused dominance by prohibiting manufacturers of Android OS smartphones from pre-installing applications competing with applications from the Google Mobile Services (GMS) package. Google's abusive practices included tying Google Play application stores with other applications of GMS package, compulsory pre-installation of Google search as the default search, preferential placement of Google applications on the home page and prohibition of pre-installation of competing software on smartphones. As a result, Google was fined 438,067,400 roubles and required to, inter alia, introduce the necessary amendments to its agreements with smartphone manufacturers.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

If a clause in a contract involving a dominant company is inconsistent with the legislation, FAS may first issue a warning order to a business entity suggesting it to remove said clause from the agreement or bring it in compliance with the legislation or, as a result of consideration of an antitrust case, issue the same compliance order. Alternatively, FAS may apply to court to invalidate the respective clause.

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31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is possible in the Russian Federation. A private party may apply to court to order a dominant firm to grant access to infrastructure (in particular, if a dominant firm enjoys a natural monopoly), to supply goods or services, or to conclude an agreement if a dominant firm is required to do so (eg, it enjoys a natural monopoly). In other cases, it is preferable to apply to FAS first, so that FAS could establish dominance and issue a compliance order with the same effect.

A private party may apply to court to invalidate a provision of a contract or a contract as a whole, but generally only if it is its party. If it is not the case, it is preferable to apply to FAS first.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices have a claim for damages. These cases are adjudicated by courts.

The damages include: (i) actual damages – expenses that were incurred or will be incurred to reinstate the violated right or damaged property; and (ii) lost profit – profit which would have been derived in the ordinary course of business if the right had not been violated; the amount of lost profit cannot be less than the benefit earned by the dominant entity through its violation. Damages are often difficult to calculate. Therefore, the amount of damages is calculated with a reasonable degree of credibility, but recovery cannot be declined based on the fact that it is impossible to assess their exact amount.

As a way of example, the Supreme Court of the Russian Federation in Case No. 305-ES15-4533 dated 7 December 2015 ruled that a pharmaceutical producer dominant in the market for a single drug must pay 408,375,000 roubles worth of damages to its distributor, with which it unreasonably refused to conclude a supply contract. The damages were fully comprised of lost profit of the distributor – 16.5 per cent of the price of the supply contract which the distributor could have received if the producer had not refused to contract with it.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

FAS decision on abuse of dominance case may be appealed either to FAS Presidium (if the decision was adopted by regional FAS offices and it breaches uniformity of antitrust law application by FAS) within a month after adoption of the decision or to an arbitrazh court within three months after adoption of the decision (one month after adoption of the decision of FAS Presidium if the case was reviewed by it). FAS Presidium will review only matters of the law. The arbitrazh court will review both the facts and the law.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Unilateral conduct of non-dominant firms may be subject to unfair competition regulation under Russian legislation.

Singapore

Lim Chong Kin and Corinne Chew
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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The abuse of a dominant position is prohibited under general competition law by the operation of section 47 of the Singapore Competition Act (Cap 50B) (Competition Act), which states that 'any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited' (section 47 Prohibition).

However, it is noteworthy that (pursuant to paragraph 5 of the Third Schedule to the Competition Act), where goods and services are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter, the section 47 Prohibition will not apply to such. In this regard, other pieces of sector-specific legislation contain provisions relating to abuse of dominance and are enforced separately by the respective regulator.

The Competition Act is enforced by the Competition Commission of Singapore (CCS). The CCS has also issued guidelines on the application of the section 47 Prohibition.

As at February 2017, the CCS has only issued one infringement decision in respect of a violation of the section 47 Prohibition since the provision took effect on 1 January 2006, namely, abuse of a dominant position by SISTIC com Pte Ltd CCS 600/008/07 (4 June 2010) (*SISTIC* case).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

No definition of dominance is contained within the Competition Act. However, the CCS Guidelines state that an undertaking will not be deemed dominant unless it has substantial market power. The CCS Guidelines go on to state that market power only arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels.

The CCS will generally take into consideration the market share of the entity in question, constraints on market power by way of existing competition (having regard to barriers to expansion), constraints on market power by way of potential competition (having regard to barriers to entry), and the significance of any countervailing buyer power.

As there has only been one abuse of dominance infringement finding issued by the CCS to date, it is unclear as to how matters of 'relative dominance' or 'heightened market power' would be treated under Singapore competition law.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The objective of the Competition Act (and by extension the section 47 Prohibition) is to promote the efficient functioning of the markets in Singapore and to enhance the competitiveness of the economy through prohibiting anticompetitive activities that unduly prevent, restrict or distort competition. This was clearly expressed during the second reading of the Competition Bill, by the then Senior Minister of State for Trade and Industry (Vivian Balakrishnan). Moreover, the CCS has publicly stated that Singapore competition law adopts a 'total welfare' standard, rather than a 'consumer welfare' standard. In this regard, a dual agency design exists in Singapore whereby the CCS focuses on the enforcement of competition law, whereas consumer law issues are dealt with by a completely separate organisation.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

As outlined in question 1, the Competition Act does not apply to any conduct in relation to any goods and services that are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter. In this regard, the following sectors have their own sector-specific abuse of dominance provisions:

- electricity, under the Electricity Act (Cap 89A) – enforced by the Energy Market Authority;
- gas, under the Gas Act (Cap 116A) – enforced by the Energy Market Authority;
- newspapers and broadcasting, under the Media Development Authority of Singapore Act (Cap 172) and the Code of Practice for Market Conduct in the Provision of Media Services 2010 – enforced by the Media Development Authority of Singapore;
- postal services, under the Postal Services Act (Cap 237A) and the Postal Competition Code 2008 – enforced by the Infocomm Development Authority of Singapore;
- telecommunications, under the Telecommunications Act (Cap 323) and the Code of Practice for Competition in the Provision of Telecommunication Services 2012 – enforced by the Infocomm Development Authority of Singapore; and
- airport services and facilities, under the Civil Aviation Authority of Singapore Act (Cap 41) and the Airport Competition Code 2009 – enforced by the Civil Aviation Authority of Singapore.

The section 47 Prohibition also does not apply to certain specified activities set out in paragraph 6 of the third Schedule to the Competition Act (including, inter alia, cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap 170A)).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The section 47 Prohibition applies generally to all undertakings in Singapore and section 33 of the Competition Act specifies that the abuse of dominance prohibition will apply to undertakings that are outside of Singapore, where they are engaging in conduct that would infringe the section 47 Prohibition.

However, under section 33(4) of the Competition Act, the section 47 Prohibition will not apply to any activity carried on by, any agreement entered into by, or any conduct on the part of:

- the government;
- any statutory body; or
- any person acting on behalf of the government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.

The Third Schedule to the Competition Act also sets out various exclusions from the application of the section 47 Prohibition which include (inter alia) the activities of clearing houses, and conduct pertaining to the supply of piped potable water, the supply of wastewater management services, the supply of scheduled bus services by a licensed and regulated person, the supply of rail services by a licensed and regulated person, or cargo terminal operations carried on by licensed and regulated persons.

To reiterate, and as outlined in question 5, the section 47 Prohibition does not apply to any conduct in relation to any goods and services that are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The section 47 Prohibition requires both that the undertaking in question holds a dominant position and that the undertaking engages in conduct that would amount to an abuse of that dominant position. Accordingly, if it were determined that the undertaking in question was not dominant, its conduct would not fall for consideration under the section 47 Prohibition.

7 Collective dominance

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

There is no specific reference in the Competition Act relating to collective dominance. However, the CCS Guidelines do refer to the concept, and specifically state that the section 47 Prohibition can extend to conduct on the part of two or more undertakings. The CCS Guidelines state that a dominant position may be held collectively when two or more undertakings are linked in such a way that they adopt a common policy in the relevant market, or in other words, there is some form of tacit coordination between the parties. To date, there have been no enforcement actions involving the concept of collective dominance and, accordingly, the boundaries of the concept are yet to be fully tested.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

There is no distinction or specific reference in the Competition Act or the CCS Guidelines with regard to the application of the section 47 Prohibition to sellers and purchasers. Accordingly, the section 47 Prohibition can be applied to both purchasers and sellers in appropriate circumstances. There is no further guidance from the CCS as to how the application of the prohibition to purchasers and sellers may differ (if at all).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The CCS employs the hypothetical monopolist test (otherwise known as the SSNIP test) in its approach to defining the relevant market. This essentially involves the consideration of a hypothetical monopolist of the focal product in question and questioning whether that monopolist could profitably impose a small but significant, non-transitory increase in price. Through the use of this test, the market will be defined as the smallest product group (and geographical area) over which the hypothetical monopolist controlling that product group in that area could profitably sustain such a price increase.

Notwithstanding the analytical framework above, given data limitations in reality, the CCS will commonly rely on qualitative assessments of demand-side and supply-side substitutability in the process of market definition. The conceptual approach in relation to market definition for abuse of dominance cases (ie, the hypothetical monopolist test) will essentially be the same as that employed in the context of merger cases. However, the test in an abuse of dominance context will be likely to contemplate price increases against 'competitive price levels' (rather than against 'prevailing price levels' in merger cases) in order to avoid the well-known 'Cellophane fallacy'.

The CCS Guidelines specifically state that 'there are no market share thresholds for defining dominance under the Section 47 Prohibition'. However, the CCS Guidelines go on to state that, generally, and as a starting point, the CCS will consider a market share in excess of 60 per cent as likely to indicate that an undertaking is dominant in the relevant market. In the *SISTIC* case, the CCS argued that 'SISTIC's persistently high market share over time, as opposed to high market share at a point in time, is indicative of its dominance'. The Competition Appeal Board (CAB) agreed with this proposition and stated that there were no exceptional circumstances shown by SISTIC to rebut such indication. Accordingly, while the CCS Guidelines indicate that market share is a starting point, the CAB's decision in the *SISTIC* case points to market share giving rise to a rebuttable presumption in certain circumstances.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The issue of abuse is assessed by the CCS on a case-by-case basis, and the analysis will be an effects-based analysis, rather than a form-based analysis. That being said, it seems clear from the CCS Guidelines, and from the *SISTIC* case, that the focus of the CCS will be on exclusionary behaviour, which may include 'excessively low prices, certain discount schemes, refusals to supply, or vertical restraints, which foreclose (or are likely to foreclose) market or weaken competition'. The CCS Guidelines state that such conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors or excluding new competitors from entering the market.

In relation to the *SISTIC* case, in lodging an appeal to the CAB, one of SISTIC's grounds of appeal was that its conduct was not abusive, and, accordingly, the definition of abuse (and the test for such) was considered by the CAB. In issuing its decision, the CAB determined that an abuse will be established where a competition authority demonstrates that a practice has, or is likely to have, an adverse effect on the process of competition, in particular:

- *it is sufficient for the competition authority to show a likely effect and it is not necessary to demonstrate an actual effect on the process of competition; and*
- *if an effect, or likely effect, on restricting competition by the dominant firm is established, the dominant undertaking can advance an objective justification. If it can adduce evidence to demonstrate that its behaviour produces countervailing benefits so that it has a net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification.*

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Despite the Competition Act being modelled on the UK Competition Act (and the European competition laws), purely exploitative conduct would arguably not constitute an abuse of dominance in Singapore. Critically, while UK and European laws contain a specific reference to the direct or indirect imposition of 'unfair purchase or selling prices or other unfair trading conditions', this was removed from the Competition Act before it was enacted in Singapore. Moreover, the CCS Guidelines contain no reference (or any examples) with regard to exploitative conduct constituting an abuse of dominance. However, the CCS is yet to

make a definitive statement in relation to whether exploitative conduct could constitute an abuse and the position is yet to be legally tested.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

No causal link between dominance and abuse must be shown as a matter of law, and the CCS will assess the issues of dominance and abuse separately.

That being said, there may be instances where the dominance of an undertaking might cast light on the issue of whether its conduct is abusive and vice-versa. In the *SISTIC* case, the conduct in question involved exclusive contracts between SISTIC and its venue operator and event promoter partners. In considering the question of barriers to entry (in the context of considering whether SISTIC held a dominant position), the CCS observed that SISTIC's strategic conduct (ie, its exclusive agreements with key industry players) made large-scale entry even harder. In particular, the CCS stated in the *SISTIC* case that 'the barrier to entry in relation to network effect is artificially erected and sustained by SISTIC's strategic conduct'. In this regard, and in appropriate circumstances, it is possible that the CCS will not make determinations of dominance and abuse completely in isolation from one another.

In addition to the above, it is also noted that the CCS Guidelines specifically state that it is not necessary for the dominant position, the abuse and the effects of the abuse to be in the same market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In assessing whether conduct is abusive, the CCS Guidelines state that the CCS may consider whether the dominant undertaking is able to objectively justify its conduct. However, to rely on this defence, it will be necessary for the dominant undertaking to show that it has behaved in a proportionate manner in defending its legitimate commercial interest and that it had not taken any measures that are more restrictive than necessary in doing so. While the CCS Guidelines indicate that objective justifications will be taken into consideration when assessing whether conduct is abusive, the test arising from the CAB's decision in the *SISTIC* case instead suggests that objective justifications can be a defence after the conduct has already be classified as abusive, and that the burden is on the dominant undertaking in question to establish those objective justifications. This is described in further detail in question 10.

Specific forms of abuse

14 Rebate schemes

The CCS Guidelines state that in certain circumstances discounts or rebates could give rise to abuse of dominance concerns. In particular, the CCS Guidelines state that the CCS will consider a range of factors in assessing such discounts, including whether the discount simply reflect competition to secure orders from valued buyers. The CCS Guidelines continue to state that a key question is whether the discount scheme will have an exclusionary effect on competition, which might arise where the discount arrangement amounts to a 'fidelity discount' or where it involves the tying of other products. The CCS Guidelines also state that it is necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced. To date, there have been no enforcement actions in Singapore involving rebate schemes.

15 Tying and bundling

The CCS Guidelines state that tying, which occurs where the manufacturer makes the purchase of one product (the tying product) conditional on the purchase of a second product (the tied product), may amount to an abuse of dominance in certain circumstances. There have been no relevant enforcement cases in Singapore to date.

16 Exclusive dealing

Exclusivity arrangements, non-compete provisions and single branding may amount to an abuse of a dominant position, and the CCS elaborates on such in the CCS Guidelines. It is noteworthy that the *SISTIC* case, being the only abuse of dominance enforcement action taken by the CCS to date, primarily involved exclusivity provisions within supply contracts. In the *SISTIC* case, the CCS observed that the imposition of exclusive purchasing obligations is a common practice in commercial life, which may not be anticompetitive per se. The CCS continued to observe that in many circumstances, exclusive purchasing, especially those that come with discounts and other incentives, may bring about some pro-competitive outcomes such as lower prices and higher efficiency. Accordingly, it would seem that the primary consideration in assessing whether such restrictions are abusive is the extent to which competitors are foreclosed as a result.

17 Predatory pricing

The Competition Act, at section 47(2)(a), specifically states that 'predatory behaviour towards competitors' may constitute an abuse of dominance. The CCS Guidelines state that, in assessing predatory pricing cases, the CCS will have regard to the relevant price level against two measures of cost: average variable cost and average total cost. The Guidelines continue to state that, in the absence of an objective justification, predation may be presumed where price is below average variable cost. Where price is above average variable cost, but below average total cost, then the CCS will have regard to other evidence. Where price is above average total cost, the CCS Guidelines indicate that this will not indicate predation. It is also noteworthy that the CCS has indicated that the feasibility of recouping losses may also be taken into consideration when assessing a predation issue. To date, there have been no enforcement actions taken by the CCS involving predatory pricing.

18 Price or margin squeezes

Where a dominant, vertically integrated undertaking discriminates in the supply of an input to downstream entities (ie, providing preferential terms to its own downstream affiliate), such actions could be considered abusive according to the CCS Guidelines. Such actions can be called 'price squeezes' or 'margin squeezes'. The CCS Guidelines state that, in testing for a margin squeeze, the CCS will generally determine whether an efficient downstream competitor would earn (at least) normal profit when paying input prices set by the vertically integrated undertaking. To date, there have been no enforcement actions in Singapore involving price squeezes.

19 Refusals to deal and denied access to essential facilities

The CCS Guidelines state that undertakings generally have the freedom to decide whom they will deal with and not deal with, and accordingly that a refusal to supply will generally not be abusive. An exception arises where there is a refusal (or constructive refusal) to supply an essential facility. The CCS Guidelines state that a facility will be viewed as essential only where it can be demonstrated that access to it is indispensable in order to compete in a related market and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy). To date, there have been no enforcement actions taken by the CCS involving refusals to supply or essential facilities.

20 Predatory product design or a failure to disclose new technology

Predatory product design or failure to disclose new technology is not specified as potentially abusive conduct within the CCS Guidelines, nor has been considered specifically by the CCS in any case to date. Notwithstanding this, the CCS has indicated that it will consider the likely effects on competition based on the specific facts and circumstances of each case.

21 Price discrimination

The CCS Guidelines state that price discrimination is a usual business practice in a wide range of industries, including those in which competition is effective. However, it goes on to acknowledge that price or non-price discrimination (ie, discrimination in relation to service) may be abusive in certain circumstances. The CCS Guidelines highlight that price discrimination could be problematic where it gives rise to a predatory pricing issue, a loyalty-inducing rebate or discount issue or a margin squeeze issue. In this regard, it is arguable that price discrimination

Update and trends

In December 2016, the CCS issued revised guidelines relating to the application of the section 47 Prohibition. Some notable changes to the guidelines included a more expanded discussion of the concept of collective dominance, and the incorporation of the legal test for abuse of dominance, as determined in the *SISTIC* case. The guidelines also specify that the CCS will use a counterfactual assessment as a tool for assessing abuse of dominance where appropriate. It is also noteworthy that the CCS introduced a new 'fast-track' procedure, allowing for the quick resolution of cases, and that this procedure will apply to, inter alia, cases being considered under the section 47 Prohibition).

While the CCS has not issued any new enforcement decisions relating to the section 47 Prohibition, it has made several public statements noting the closure of several abuse of dominance investigations following the receipt of voluntary undertakings from the parties under investigation.

may simply be symptomatic of an abuse in a different form (ie, a margin squeeze), and that the CCS may not seek to frame discrimination as an abuse in and of itself. To date, there have been no cases in Singapore involving price or non-price discrimination taken by the CCS.

22 Exploitative prices or terms of supply

Exploitative prices or supply conditions would arguably not constitute the abuse of a dominant position in Singapore (see question 11).

23 Abuse of administrative or government process

The CCS Guidelines do not specifically identify 'abuse of government process' as a potential abuse of dominance, and there have been no relevant enforcement cases in Singapore to date. Notwithstanding this, the CCS has indicated that it will consider the likely effects on competition based on the specific facts and circumstances of each case.

24 Mergers and acquisitions as exclusionary practices

The CCS Guidelines do not specifically identify structural issues arising from mergers or acquisitions as potentially amounting to an abuse of dominance, and there have been no relevant enforcement cases in Singapore to date. Notwithstanding this, the CCS has indicated that it will consider the likely effects on competition, based on the specific facts and circumstances of each case.

25 Other abuses

Other than those types of abuses considered above in questions 14 to 24, there are no other types of abuse specifically identified in the CCS Guidelines. However, the CCS has indicated that it will consider the likely effects on competition, based on the specific facts and circumstances of each case. In this regard, it may be open to the CCS to consider other conduct abusive depending on the circumstances.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The CCS enforces the Competition Act and, accordingly, the abuse of dominance provisions thereunder. Generally, the CCS has the power to require the provision of documents and information from any person, to enter premises with or without a warrant and to search premises with a warrant. In requiring the provision of documents and information, the CCS has the ability to specify how that information is to be provided and, accordingly, it routinely conducts interviews. The CCS also has a range of powers related to those powers already indicated (for instance, when entering a premises under a warrant, the CCS may, inter alia, use such force as is reasonably necessary for that purpose or search any person on the premises in certain circumstances). In relation to the authorities tasked to enforce sector-specific abuse of dominance provisions, see question 4.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Under section 69 of the Competition Act, the CCS can make such directions as it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement (which potentially could involve structural or behavioural directions). In this regard, the CCS has a general discretion in relation to the sanctions it imposes, although it may (inter alia):

- require parties to an agreement to modify or terminate the agreement;
- require an undertaking to pay to the CCS such financial penalty in respect of the infringement as the CCS may determine (where it determines that the infringement has been committed intentionally or negligently) but not exceeding 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement for a period of up to a maximum of three years;
- require an undertaking to enter such legally enforceable agreements as may be specified by the CCS and designed to prevent or lessen the anticompetitive effects that have arisen;
- require an undertaking to dispose of such operations, assets or shares of such an undertaking in such a manner as may be specified by the CCS; and
- require an undertaking to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCS may determine.

In the *SISTIC* case, SISTIC was directed to pay a financial penalty of S$989,000 (which was reduced on appeal to S$769,000). Moreover, SISTIC was required to remove exclusivity clauses from certain agreements.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Yes, the CCS has the ability to adjective on abuse of dominance matters, and has a wide discretion to impose directions (including financial penalties) that it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The *SISTIC* case (as detailed in question 1), remains the only enforcement decision made by the CCS to date, relating to the abuse of a dominant position. The case is a landmark case in so far as it clarified the test for abuse of dominance in Singapore.

However, the CCS is known to actively investigate potential violations of the prohibition and may have a number of such investigations open at any one time. The CCS has made several public statements noting the closure of several abuse of dominance investigations following the receipt of voluntary undertakings from the parties under investigation.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

While provisions of agreements that are determined to be anti-competitive under section 34 of the Competition Act are void in accordance with section 34(3), there is no equivalent provision in respect of violations of the abuse of dominance prohibition. However, should the CCS determine that a contractual provision gives rise to an abuse of dominance concern, it can impose any such direction that it considers appropriate to bring the infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Stand-alone actions for competition law violations in Singapore (including the abuse of a dominant position) are not actionable in Singapore. Instead, the Competition Act only provides a right of follow-on actions for damages where the finding of an infringement by the CCS is a necessary precondition.

The right extends only to those parties who have suffered loss or damage directly as a result of an infringement of an operative provision of the Competition Act, and all such actions must be brought within two years after the expiry of the relevant appeal periods.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Parties may bring private actions for a breach of competition law under section 86 of the Act, which provides that any person who suffers loss or damage directly as a result of an infringement (including, inter alia, of the section 34 prohibition) shall have a right of action for relief in civil proceedings. The Act does not allow parties to claim for double or treble damages.

Such rights are predicated on an infringement finding by the CCS, and may only be brought within two years following the expiry of any applicable appeal periods. Third parties do not have standing to bring such claims in other circumstances, or to lodge an appeal with the CAB. On plain reading of section 86 of the Act, indirect purchasers do not have standing to bring a civil claim for damages, because only persons suffering loss or damage directly as a result of an infringement can bring such claims.

To date, there have been no cases in Singapore relating to the award of damages relating to abuse of dominance infringements.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Appeals of CCS decisions are made to the CAB, which is an independent body established under section 72 of the Act. The CAB comprises 30 members including lawyers, economists, accountants, academics and other business people. In the usual course, a panel of five members will be appointed to hear an appeal. The CAB's powers and procedures are set out primarily in section 73 of the Act and the Competition (Appeals) Regulations.

Appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the CCS's infringement decision. Thereafter, the CCS has six weeks to file its defence. The procedure and timetabling of the appeal may be determined at any time during the proceedings by the CAB, usually through holding a case management conference with the parties. The CAB has broad powers to make directions it thinks fit to determine the just, expeditious or economic conduct of the appeal proceedings. The CAB may review issues of facts and law.

Parties may appeal CAB decisions, in accordance with section 74 of the Act, to the High Court on a point of law arising from a decision of the CAB, or in respect of any decision made by it as to the amount of the financial penalty. Appeals are brought by way of originating summons, and the procedure governing the appeal is set out in order 55 of the Rules of Court (Cap 322, R 5, 2006 Rev ed).

Parties may also appeal High Court decisions to the Court of Appeal under section 74 of the Act. Such appeals are governed by the same procedure as all other civil appeals in Singapore. There is no further appeal right from the Court of Appeal.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

No. There are no specific restrictions under the Competition Act relating to unilateral conduct by non-dominant firms.

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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The statutory provision dealing with the behaviour of dominant firms is article 9 (Prohibition of the Abuse of a Dominant Position) of the Slovenian Prevention of the Restriction of Competition Act (PRCA-1), which entered into force on 26 April 2008. Although the PRCA-1 was amended in 2009, 2011, 2012, 2014 and 2015, the provisions of article 9 have been kept unchanged since 2008.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 9(2) of the PRCA-1 defines 'a dominant position' as a position of an undertaking or several undertakings when they can, to a significant degree, act independently of competitors, clients or consumers. Such an approach follows the case law of the European courts.

In determining the dominant position, the Slovenian Competition Protection Authority's (CPA) takes into consideration, in particular, the market share, financial options, legal or actual entry barriers, access to suppliers or the market and existing or potential competition.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Article 74(3) of the Constitution of the Republic of Slovenia prohibits practices that restrict competition in a manner contrary to the law. However, it is not entirely clear whether consumer welfare or total welfare is the object of the legislation and the CPA's competition policy. Considering the general alignment of the PRCA-1 with the EU competition law and policy, it is expected that in the future the CPA's activities will focus more on the effect of conduct on consumers than on the dominant company's competitors. A good example of putting consumer welfare and economic efficiency at the forefront is the CPA's decision in the *Mobitel/WWI* case (2005), where the CPA expressly stated that the wording of the PRCA-1 does not permit any doubt regarding the fact that Slovenian competition law is protecting efficient competition on the market and not directly protecting the participants on the market. Low prices of services primarily benefit consumers, therefore, stagnation or even withdrawal of the inefficient company from the market is a logical result of a working competition environment and it is not problematic from a competition law point of view.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Under Slovenian competition law in the PRCA-1, there are no sectoral exemptions in terms of dominance. However, some sector-specific statutes create special regulatory bodies, which regulate the behaviour of undertakings active in specific sectors. The most important are the following sectors: banking, public media, postal services, electronic communications, insurance, energy, food, rail transport and the financial sector.

Generally, the sector regulators in Slovenia have authority to carry out analysis of the relevant markets in the scope of a specific sector (such as, for example, telecommunications products and services). This analysis aims at ascertaining whether the relevant market is effectively competitive, which in turn means that the sector regulators regulate markets ex ante, while the CPA acts ex post.

In ensuring effective competition in the electronic communications market with ex ante regulation, the sector regulator (Agency for Communication Networks and Services of the Republic of Slovenia (AKOS)) assesses whether an undertaking has 'significant market power' under the criteria defined by the Electronic Communication Act, which has similar meaning as 'dominance' according to article 9 of the PRCA-1. The Electronic Communication Act also includes certain obligations of undertakings in the telecoms sector that have 'significant market power'.

The liberalisation of the postal services market was implemented gradually and has been fully effective since 2009 with the adoption of the new Postal Services Act, which determines that the Republic of Slovenia ensures universal postal services in the public interest under the same conditions to all of its users in its territory and also determines the conditions governing the provision of these non-monopolised services. The sector regulator AKOS has the power to appoint such universal service providers and monitor their performance and quality. The appointed universal service provider must grant access to the facility of the universal service provider to other interchangeable postal service providers.

The Energy Agency has the power to regulate and monitor the energy market, in particular, the electrical energy and the natural gas markets, with the aim of ensuring unbiased and equal circumstances for all participants of the energy markets as well as assistance with setting conditions for the effective functioning of these markets. It has to submit annual reports regarding the state of the energy market in Slovenia, which includes, inter alia, a report on the potential dominant position in the market of electrical energy and natural gas and on existing infringements of competition law.

The Public Media Act empowers the Ministry of Culture to refuse to give consent regarding concentration of ownership of printed media, radio or television, if the concentration creates a dominant position in the media market and contains specific provisions that define a dominant position in those cases.

The relationship between the sector-specific provisions and the general abuse of dominance legislation depends on the terms of the sector-specific rules. Article 9 of the PRCA-1 applies to all undertakings, irrespective of the industry sector they belong to. Therefore, regulated undertakings must comply with the general abuse of dominance legislation, unless the sector-specific law (expressly or implicitly) prescribes the exemption. Considering that the powers of the CPA and sector regulators do not overlap and that the sector-specific provisions in connection with dominance mostly define powers and duties of the sector regulators, but not of the CPA, it can be concluded that article 9 is complementary to the sector-specific rules.

In 2014 the Agriculture Act established a new monitoring authority in the form of an Ombudsman for the relations in the food supply chain, and provided some new competences for the CPA in relation to the imposed conduct rules in the food sector. The Agriculture Act identifies acts that are considered illicit practices when they are enforced by undertakings that hold 'significant market power' and in contrast with fair trade practices abuse the other contracting party. Illicit practices are defined, in particular, as failure to comply with statutory payment deadlines or imposition of conditions, such as extra payments, bonuses, rebates, promotions or unfair supply conditions. The CPA is responsible for the supervision of the implementation of provisions on illicit practices and is competent to impose fines. If the illicit practice also breaches the PRCA-1 (ie, if the undertaking involved would hold the dominant position as it is defined in the PRCA-1) the CPA can initiate antitrust proceedings, which can lead to antitrust fines.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Article 9 of the PRCA-1 applies to undertakings. The PRCA-1 defines the concept of 'undertaking' as any entity that is engaged in economic activities, regardless of its legal and organisational form and ownership status. An 'economic activity' means any activity that is performed on the market for payment. Accordingly, public entities and other legal entities subject to public law and performing economic activities are also subject to the PRCA-1. An undertaking also means an association of undertakings that is not directly engaged in an economic activity but affects or may affect the behaviour in the market of undertakings as defined above. There is no precedent on the treatment of incumbents on markets in services that are provided without payment such as Whatsapp, or online search engines.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Slovenian competition law does not cover conduct through which a non-dominant company becomes (or attempts to become) dominant. Article 9 of the PRCA-1 applies specifically to firms that are already dominant.

7 Collective dominance

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

Article 9 covers collective dominance, though there are no details on the assessment of the collective dominance prescribed in the PRCA-1, except its presumption when the collective market share reaches the threshold of 60 per cent on the relevant market.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Pursuant to the provisions of article 9, imposing of unfair purchase prices constitutes an abuse of a dominant position. Consequently, it can be concluded that the PRCA-1 applies also to dominant purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The basic definition of a 'relevant market' is provided in article 3 of the PRCA-1, which also reflects EU competition legislation and case law, and is the same as the one for merger control purposes. A 'relevant market' means a market defined by the relevant product or service market and the relevant geographic market. The 'relevant product or service market' represents a market that, as a rule, comprises all products or services that are regarded as interchangeable or substitutable by the consumer or user given their characteristics, their prices or their intended use. In turn, 'relevant geographic market' is defined as a market that, as a rule, comprises an area in which competitors in the relevant product or service market compete in the sale or purchase of products or services, an area in which the conditions of competition are sufficiently homogeneous and that can be distinguished from neighbouring areas because the competition conditions are substantially different.

Article 9(5) of the PRCA-1 defines the market-share threshold for dominance as follows: 'An undertaking shall be deemed to have a dominant position on the market if its market-share within the market of the Republic of Slovenia exceeds a threshold of 40 per cent'. Even though the market share threshold creates a legal presumption, such a presumption may be rebutted, since market share is an important, though not crucial, indicator of dominance.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Similar to the EU competition law, the abuse of a dominant position as such is not defined by the PRCA-1. The PRCA-1 generally prohibits the abuse of a dominant position and lists four typical examples of abusive behaviour:

- directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts.

The CPA's case law is generally aligned with EU case law and it shows that abuse is still defined more in terms of the form of conduct rather than in relation to the effects of specific conduct in the market and on consumers.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

It can be seen from the list in question 10 that the concept of abuse covers exploitative as well as exclusionary practices. The example of exploitative abuse of dominant position as set out by the PRCA-1 is unfair prices or trading conditions. The examples of exclusionary abuse of dominant position as set out by the PRCA-1 include, inter alia, predatory pricing, discrimination, refusal to deal and tying.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Similar to the EU competition law, there is no direct causality between the creation of a dominant position and its abuse under Slovenian competition law. In order to apply article 9, the existence of dominant position has to be first established. However, simply having a dominant position is not illegal. Although in most cases a causal link between dominance and abuse is shown, an abuse may exist even if there is no causal link between the dominant position and the inspected conduct. Further, it is also possible that the abusive conduct can take place in a market other than the market where the dominant position is established.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

If abuse of a dominant position is established, it shall be prohibited, with no explicit exemptions. The PRCA-1 does not provide for efficiency defence. Nevertheless, while the existence of efficiency defence under

Slovenian law was never confirmed by the CPA, it is expected that its future case law will follow the practice of EU case law. So far, the most common defence arguments by the dominant undertakings have been that their conduct is justified on objective grounds. In such cases, the CPA assesses whether the dominant undertaking provided all the necessary evidence to show that the conduct is indispensable and proportionate to the goal pursued by the undertaking.

Specific forms of abuse

14 Rebate schemes

PRCA-1 does not explicit reference to granting rebates and discounts by the dominant undertakings. The case law in the *Pro Plus* case shows that the CPA considered as abuse the granting of rebates for certain shares of advertising on Pro Plus TV channels. As for granting rebates with loyalty-inducing effects, the CPA held that these rebates had tying character as they provided such a strong incentive for advertisers that they invested their entire TV advertising budget in the dominant undertaking (and not its competitors).

15 Tying and bundling

Article 9 of the PRCA-1 prohibits 'making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts'.

In a renewed case, *Telekom Slovenije (ADSL/ISDN)*, for establishing potential abuse of a dominant position regarding ISDN and ADSL tying, the CPA (2013) concluded that the incumbent operator Telekom Slovenije had abused its dominant position on the inter-operator broadband access market with bit-streaming via the copper-based network in the Republic of Slovenia by making ADSL connections for internet providers conditional on the prior leasing of ISDN connections by end users, although ISDN connection was not needed or technically necessary.

In *Telekom Slovenije* (2015) the CPA concluded that as concerning bitstream access, Telekom Slovenije abused its dominant position by not providing the wholesale 'naked xDSL' service to alternative operators, thereby preventing them from providing the xDSL service without the underlying telephone subscription to final customers.

16 Exclusive dealing

PRCA-1 prohibits imposing unfair trading conditions, such as exclusivity. The CPA dealt with few cases where it assessed various contractual obligations that required customers to purchase specific goods or services exclusively from a dominant undertaking. The CPA held that the customers were tied to the dominant undertaking and thus prevented from buying products or services from competitors of the dominant undertaking.

Concluding exclusive dealing arrangements with advertisers was considered as abusive behaviour in *Pro Plus* (2013). In particular, the CPA concluded that Pro Plus abused its dominant position by requiring individual advertisers to devote their entire advertising budget exclusively to Pro Plus in return for granting rebates.

In *Geoplin* (2014), the CPA established that incumbent gas importer and supplier in Slovenia, Geoplin, concluded long-term contracts with industrial customers connected to the transmission network, which included contracted quantities of gas to be taken over for the whole contract period, as well as the obligation to take delivery of minimum quantities. The CPA concluded that Geoplin abused its dominant position in the market of gas supply to large industrial customers by prohibited contractual clauses that caused industrial customers connected to the transmission network to be entirely tied to Geoplin.

17 Predatory pricing

In 2012 the CPA issued a decision in *Mobitel/Telekom Slovenije (Itak Džabest)*, finding that Telekom Slovenije (previously Mobitel) had been abusing its dominant position in the retail mobile telecommunications service market by offering the 'Itak Džabest' retail package to mobile phone users at unfair sales prices. The CPA established that Telekom Slovenije acted in predatory manner by imposing the 'Itak Džabest' package at below-cost prices (lower than the costs incurred). With such unfair selling prices, Telekom Slovenije gained new users and made it more difficult for the other equally efficient competitor to gain new users and not suffer a loss by doing so. The Supreme Court did not confirm the CPA's decision and returned the case to the CPA, which has to re-open the administrative procedure. It considered, inter alia, that the CPA failed to give reasons for the method that was used to calculate the incremental costs and explicitly stated that a transparent calculation of negative margin per subscriber is crucial in cases like this one where there is no clear and direct evidence of a 'predation strategy'. While accepting that the cost–price analysis is an element in deciding whether a price is predatory, the Supreme Court noted that it was also relevant what the effects of the introduction and sale of the contested package were likely to be on the elimination of competitors, which (in the long run) harm the consumers.

18 Price or margin squeezes

Price squeezes are not specifically mentioned in article 9(4) of the PRCA-1. In principle, the CPA tends to follow the practice as developed under article 102 TFEU.

The CPA dealt with an alleged abuse of dominant position by price squeeze in *Mobitel/Telekom Slovenije (Itak Džabest)* (2012). After an in-depth inquiry it decided to drop the price squeeze part of complaint and ended the proceedings against Telekom Slovenije at the part regarding the possibility of creating margin squeeze policy on the wholesale market by charging its competitor (Tušmobile) more for the data transfer than it charged its own users. Similarly, in *Telekom Slovenije* (2015) the CPA in its final decision removed the price squeeze allegations.

19 Refusals to deal and denied access to essential facilities

In *Luka Koper* (2009), the CPA held that an undertaking owning or managing an infrastructure, without which its competitors can not perform their activities, may not refuse access to infrastructure without justified reasons. Otherwise, such behavior constitutes an abuse of dominant position. The CPA found that according to the lease agreement concluded with Republic of Slovenija, Luka Koper had an obligation to allow access to port infrastructure under the same conditions to all legal and natural persons performing economic activities. The CPA held that access to port infrastructure (mooring for towing ships) managed by Luka Koper was a prerequisite to perform towing of ships.

20 Predatory product design or a failure to disclose new technology

The CPA has not yet dealt with issues regarding predatory product design or a failure to disclose new technology. Although this form of abuse is not specifically regulated by the PRCA-1, the CPA generally follows EU case law as developed under article 102 of the TFEU.

21 Price discrimination

This practice is included in the exemplary list of article 9(4) and is described as 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

For example, the CPA established (2011) that SAZAS, the Society of Composers, Authors and Publishers for Copyright Protection in Slovenia, which has a legal monopoly on collective management of copyrights to music authors, abused its dominant position in the market for collective management of copyrights to authors by sharing collected funds among its members based on non-transparent, subjective and retroactively set rules adopted by a limited number of members, thereby placing some authors at a competitive advantage. The CPA held that SAZAS had established a non-transparent system according to which only few authors had a right to decide on the rules on the distribution of the collected royalties to authors. With this system SAZAS favoured some authors, especially those who were included in the decision-making process of distribution of the collected royalties, which led to discrimination among authors. With its decision, the CPA also imposed obligations on SAZAS regulating relations between the SAZAS's members. Further, in the same proceedings, the CPA raised additional concerns that SAZAS may have also abused its dominant position in the market of the licensing of public performance music copyrights to users by discriminating the same type of users who wish to use copyright musical works in public. However, the CPA has not yet adopted a final decision on this part of the allegations regarding SAZAS's activities towards the users.

In *SODO* (2012), the CPA found that SODO, the electricity distribution system operator in the Republic of Slovenia, had abused its dominant position in the market for the management of the electric energy distribution network by charging only some electric power producers for excessive electric energy received and, thus, applying discriminative conditions to undertakings.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply are included in the list of article 9(4) as an example of 'directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions'. The CPA has not yet decided on any relevant excessive pricing case in practice.

23 Abuse of administrative or government process

The CPA has not yet dealt with issues regarding abuse of government process. Although this form of abuse is not specifically regulated by the PRCA-1, the CPA generally follows EU case law as developed under article 102 of the TFEU.

24 Mergers and acquisitions as exclusionary practices

This form of abuse is not specifically regulated by the PRCA-1. Nor has the CPA yet decided on any case involving mergers and acquisitions as exclusionary practices.

25 Other abuses

The CPA has not yet decided on any case dealing with other types of abuse, such as strategic capacity construction or underinvestment in capacity, predatory advertising or excessive product differentiation. It has to be noted that the list of forms of abuse in article 9 is not exhaustive. Therefore, the CPA is not excluded from dealing with other types of abusive practices.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Slovenian Competition Protection Agency has the power to enforce article 9 of the PRCA-1 and also article 102 of the TFEU. The CPA has extensive investigatory powers with regard to discovering breaches of the prohibition of abuses of a dominant position. The CPA can issue requests for information and carry out inspections of the premises of undertakings against which procedure has been initiated. An inspection of the premises shall be based on the consent of the undertaking or a reasoned written court order. If the latter is the case, the inspection must be carried out in the presence of two adult witnesses (there is no rule as to who those people need to be). When conducting an inspection, authorised persons may enter and inspect the premises at the registered office of the undertaking and at other locations at which the undertaking itself or another undertaking authorised by the undertaking concerned performs the activity and business for which there is probability of an infringement of article 9 of the PRCA-1 or article 102 of the TFEU. They may examine business books and other documentation, irrespective of the medium on which they are stored. The authorised persons may ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject matter and purpose of the inspection and record it.

Subject to certain conditions, the CPA may also search the premises of an undertaking against which the procedure has not been initiated or the residential premises of members of the management or supervisory bodies or of staff or other associates of the undertaking against which the procedure has been initiated.

In the administrative procedure the CPA can:

- issue a decision establishing the existence of an infringement of article 9 of the PRCA-1 or article 102 of the TFEU and require the undertaking concerned to bring such an infringement to an end;
- issue a decision making binding commitments proposed by the undertaking against which the procedure has been initiated; or
- terminate the proceedings.

Update and trends

In 2016 the Ministry of economic development and technology (Ministry) and the CPA proposed some important changes to the PRCA-1. The CPA proposed, inter alia, a system for sanctioning breaches of competition law that could finally be excluded from the general minor offence proceedings system and is intended to be governed by specific rules laid down in the PRCA-1. The Ministry has prepared amendments to the PRCA-1, that will implement the 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. At the time of writing this contribution these amendments are still in the legislative process.

The recent court reviews of the CPA's administrative decisions in the abuse of dominant position cases show that the CPA will have to strengthen its economic analysis. In the case *Geoplin* (2015), for example, the court held that the CPA failed, inter alia, to carry out an economic analysis of factors that are necessary for defining the relevant market, and returned the case to the CPA for re-evaluation.

Sanctions and remedies

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

In the case of a breach of article 9 of the PRCA-1 or article 102 of the TFEU, the CPA can impose a minor offence fine of up to 10 per cent of the annual turnover of the undertaking in the preceding business year on a legal entity, entrepreneur or an individual who performs economic activity. A fine of between €5,000 and €30,000 can also be imposed on the responsible person of a legal entity or the responsible person of an entrepreneur. The definition of responsible person can be found in the Minor Offences Act and it is broader. It includes (i) persons authorised to perform work in the name, for the account, to the benefit or with the assets of a legal entity, entrepreneur, individual, engaged in professional activity, state or local authority, or (ii) persons authorised with a legal entity to perform due supervision by which minor offences may be prevented.

In *Pro Plus* (2014), the CPA imposed a fine of nearly €5 million for abuse of a dominant position, which is the highest ever imposed fine for breaking competition rules in Slovenia. However, after the Court's review, the CPA had to terminate the minor offence proceedings in a substantial part.

The CPA can also impose on the undertaking behavioural or structural remedies. According to article 37 of the PRCA-1, the CPA may impose on the undertaking the obligation to take reasonable measures to bring an infringement and its consequences to an end, in particular through the disposal of business or part of the undertaking's business, division of an undertaking or disposal of shares in undertakings, transfer of industrial property rights and other rights, conclusion of licence and other contracts that may be concluded in the course of operations between undertakings, or ensuring access to infrastructure.

Article 225(1) of the Criminal Code prescribes imprisonment for between six months and five years for persons who, while performing a business activity, breach antitrust rules banning the abuse of a dominant position of one or more undertakings, and who in this way prevent, materially impede or distort competition in the Republic of Slovenia or in the EU market, or materially or in significant part affect trade between member states, resulting in significant proceeds for that undertaking or undertakings, or significant loss for another undertaking.

In addition, a business entity can be held responsible for the same offence in accordance with the Liability of Legal Persons for Criminal Offences Act, punishable by a fine of between €10,000 and €1 million, forfeiture of property, termination of the undertaking, a ban on participation in public procurement or a ban on trading with financial instruments.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The CPA conducts two types of procedures: an administrative procedure in which infringements of article 9 of the PRCA-1 and article 102 of TFEU are assessed and brought to an end and a minor offence procedure where fines are levied. It follows that the CPA imposes sanctions directly.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

To date, article 9 has been mostly used in the regulated industries, in particular, telecommunications and energy. The CPA on average issues one decision with regard to the abuse of dominant position per year and initiates one new abuse of dominance proceedings per year. The average length of abuse of dominance proceedings, from initial investigation to final decision, is more than two years. However, there have been several recent cases of prohibition decisions that the court have sent back to the CPA for re-examination: *Mobitel/Telekom Slovenije (Itak Džabest), Geoplin* and *Telekom Slovenije (ISDN/ADSL)*.

In 2015 to date, the CPA has initiated three new cases, which are still open. The first case was initiated in 2015 against IKO, the supplier of television channels with sports contents in Slovenia, for alleged abuse of its dominant position with regard to limiting and hindering access to sport television channels to retail television operators. The second case relates to e-commerce, where Panteon Group, provider of services of inter-organisational business operations, allegedly refused access to certain electronic data exchange systems held by providers of electronic data exchange services and their users. Very recently (2017) the CPA opened proceedings against Pro Plus for alleged abuse of its dominant position in the wholesale supply of TV channels.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The PRCA-1 contains no specific provisions concerning the consequences of an infringement for the validity of contracts entered into by dominant companies, therefore, general civil law applies. According to article 86 of the Code of Obligations, a contract that contravenes the constitution, compulsory regulations or moral principles shall be null and void if the purpose of the contravened rule does not assign any other sanction or if the law does not prescribe otherwise for the case in question. If one party alone is prohibited from concluding a specific contract, the contract shall remain in force unless stipulated otherwise by law for the case in question, while the party that infringed the legal prohibition shall bear the appropriate consequences.

According to article 88 of the Code of Obligations, the contract itself shall not be null and void if it can stand without the null provision and if this null provision was not a contract term or a decisive motive for reason of which the contract was concluded. However, the contract can remain valid even when the null provision is a contract term or a decisive motive, if the purpose of establishing nullity is to rid the contract of this null provision and the contract could be valid without it.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Procedures in all antitrust cases before the CPA are initiated ex officio by the CPA. While the affected party can provide the CPA with relevant information and evidence, the CPA is not obliged to initiate the procedure. However, affected parties (competitors or customers) can enforce article 9 before the national courts although they do not have competence to prohibit abusive practices. The PRCA-1 provides that a person who intentionally or through negligence infringes the provisions of article 9 of the PRCA-1 or article 102 of the TFEU shall be liable for the damage caused by such infringement, but it contains no specific rules for private enforcement. Private enforcement in Slovenia is mainly focused on damage claims, where general rules for damages apply. If the damage has been caused by the infringement of provisions of article 9 of the PRCA-1 or article 102 of the TFEU, the court shall be bound by the final decision of the CPA and the European Commission establishing the existence of the infringement. The statue of limitations for compensation claims is suspended from the date of initiating procedure before the CPA or the European Commission to the date on which such procedure has been finally concluded. The PRCA-1 in article 37(2) provides a legal basis for the CPA to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract. This provision does not apply to private suits before the national courts. Consequently, the national courts have the power to order a defendant to provide access to its infrastructure or network or other obligations only within the scope of the provisions of article 133 of the Code of Obligations, which provide that at the request of an interested person, the court can order appropriate measures to prevent the occurrence of damage or alarm or to dispose of a source of danger, to be taken at the expense of the possessor thereof should the latter fail to do so. See, for example, the judgment of the Supreme Court of 23/05/2014 in the telecommunications case No. III *Ips* 98/2013. In practice, such cases of private enforcement are rare, mainly because of the difficulties of meeting the burden of proof in damage claims. Nevertheless, in recent years there has been increasing number of private suits before the national courts where the competitors seek protection of their interest directly through damage claims.

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32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Companies harmed by abusive practices have a claim for damages (see question 31). District courts are competent in civil disputes and can adjudicate on such claims. There is a recent telecommunications case of damages having been granted by the court (see the judgment of the Supreme Court of 23/05/2014, case No. III *Ips* 98/2013). After a 10-year-long judicial proceedings the private company's (competitor) claim for damages for breach of competition law finally resulted in an award of €941,262 plus interest.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The undertakings may bring an action against decisions finding an abuse before the Administrative Court within 30 days of service of the decision. The appellant may not introduce new facts or propose new evidence in judicial protection proceedings. The court reviews the CPA's decision within the limits of the claim and within the limits of the grounds stated in the claim, and, ex officio, devotes attention to essential violations of the provisions of the proceedings.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Slovenian competition law does not apply to conduct of non-dominant firms that are nearly as powerful as the dominant firm in the market.

Spain

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Law 15/2007 on the Defence of Competition (LDC), which came into force in September 2007, prohibits the abuse of a dominant position under article 2. This article is the national equivalent of article 102 of the Treaty on the Functioning of the European Union (TFEU), which is also applicable in Spain, as a member state of the European Union. This legislation is enforced by the national competition authority (CNMC) and the regional competition authorities (together, the Spanish Competition Authorities (SCAs)).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

For the SCAs and courts, dominance means the ability of a company to behave to an appreciable extent, independently of its competitors, its customers and ultimately of the consumers, thereby being able to adjust pricing or any other characteristic of the product or service to its own advantage (*Mediapro*, 2011, *COFAS*, 2000, *Bacardi*, 1999, *Propiedad Intelectual Audio-visual*, 1999).

The SCAs usually take into account several elements of the structure of the affected markets and/or of the company itself when assessing dominance, such as:

- market shares (current market shares, market shares in comparison with other undertakings and fluctuation of those market shares);
- barriers to entry and/or expansion (legal barriers such as licences, economic advantages such as economies of scale and scope and cost and networking effects);
- countervailing market power of clients (depending on the clients' size, commercial significance to the dominant firm and ability to switch or to vertically integrate); and
- the own conduct of the dominant firm. It is important to note that each of these elements, by itself, is not indicative of a dominant position and should be jointly assessed.

The legislation and case law does not recognise different types of dominance, either the firm is dominant or not.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the legislation is economic. In particular, it is aimed to protect the competitive process and to ensure that competition takes place on the merits, not biased by market power, as a mean of enhancing consumer welfare. However, public interest is also a relevant consideration for the SCAs, in particular when it sets its enforcement priorities.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are no sector-specific dominant rules. The only provision prohibiting the abuse of dominance is article 2 of the LDC, which applies in every sector in Spain. Nevertheless, there are also regulatory provisions for sectors such as telecommunications or energy that protect effective competition in those markets, and companies with significant market power are constrained by specific obligations in the markets in which they operate. However, market dominance and significant market power for regulatory provisions are different concepts.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Dominance rules apply to any entity engaged in an economic activity (*Cruz Roja de Fuengirola*, 1997) and are also applicable to public entities when they carry out private economic activities.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The unilateral behaviour of non-dominant companies attempting to become dominant is not covered by the LDC under the abuse of dominance provision (article 2 LDC). Such behaviour may fall under the merger control rules if dominance will be the consequence of a reportable concentration, or under the unfair competition rules, as some of them catch unilateral conducts form non-dominant companies.

7 Collective dominance

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

Collective dominance is also covered by the LDC (*Arbora/Ausonia*, 1992) and the SCAs have broad experience dealing with collective dominance issues in the context of merger control cases (*Heineken/Cruzcampo*, 2000 and *Unión Fenosa/Hidrocantábrico*, 1999). However, the LDC does not foresee a definition of collective dominance and it had to be constructed by case law. It is considered that a collective dominant position exits when two or more undertakings, with no need of a previous agreement, through their mutual unilateral decisions are able to modify to their own benefit the price or any other characteristic of the product, independently of their competitors, their customers and ultimately of the consumers.

There are several precedents in which the SCAs have dealt with cases of collective dominance in Spain, the most recent one being the case *Llamadas Móviles*, 2014, relating to the retail mobile telephone market, in which the SCAs did not find a clear evidence of abuse and, accordingly, did not impose any fines on the undertakings investigated.

At regional level, the most relevant case of collective dominance is the one analysed by the Basque competition authority in 2010, in the telecommunications sector. In the above-mentioned case, the authority concluded that Telefónica Móviles abused the collective dominant

position it held together with Vodafone and Orange in the Spanish retail mobile telephone market. According to the decision, Telefónica Móviles charged discriminatory tariffs to calls made to users of the Euskaltel mobile network, conduct amounting to a breach of article 2 of the LDC. The authority imposed Telefónica Móviles a fine around €1 million.

However, it should be noted that, on appeal, the Basque regional High Court of Justice annulled the fine imposed on Telefónica Móviles on the grounds that its conduct did not qualify as an abuse.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The LDC does not differentiate between dominant purchasers and dominant suppliers, and applies to both of them. An example of the application of the legislation to dominant purchasers is *Mediapro*, 2014.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

There are no differences in the ways in which the SCAs define relevant product or service and geographic markets in abuse of dominance cases and in merger control cases.

The SCAs define the relevant market taking into account the supply and demand substitutability, barriers to entry, and also the small but significant and non-transitory increase in price test, although usually they mainly focus on the demand-side-substitutability. The test is broadly the same as the test used by the European Commission (EC) when applying article 102 TFEU. In fact, the EC Notice on market definition is fully applicable in proceedings governed by Spanish law (*Distribuidoras Prensa Ciudad Real*, 2006, *Cofares/Organon*, 2003 or *Tubogas/Repsol*, 2002).

However, it is important to note that determining the exact definition of the relevant market is not indispensable to establish whether a firm is dominant or not. There are precedents in which the SCAs have not closed the definition of the relevant market in which a company is dominant before reaching the conclusion that it abused a dominant position. For example, in *McLane/Tabacalera*, 2002, the Authority considered superfluous to distinguish two independent markets, one of blond cigarettes and another one of black cigarettes, as it considered it was not relevant to assess the market power of Tabacalera (for the authority, it would be dominant both in a wide and in a narrow relevant market).

The LDC does not foresee a market share threshold above which a company will be presumed dominant, and the SCAs have clearly and consistently explained in their decisions, supported by the relevant courts, that high market shares do not prove by themselves the existence of a dominant position. Market shares are a useful indication to identify potential dominant companies, but other facts must be considered in a case by case analysis before reaching any conclusion. However, as in the case law of the European Court of Justice (ECJ), market shares over 50 per cent are likely indicative of a dominant position; market shares between 40 per cent and 50 per cent are a significant indicator of a possible dominant position; and market shares below 40 per cent do not allow to presume the existence of a dominant position, but, in order to conclude that a company is dominant, it will be necessary to prove that the company can behave to an appreciable extent independently of its competitors, its customers and, ultimately, of consumers.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

There is no definition of abuse in the LDC. However, the SCAs have consistently defined it as an 'objective concept', under which the conduct of a dominant firm, through means that are different from what is considered normal competition in the market, threatens either existing competition or the possibility of increased competition in the market (*Endesa Instalación*, 2014, *Retevision/Telefónica*, 2000, and *Airtel/Telefónica*, 1999).

The 'objective' nature for the concept of 'abuse' implies that:

- the dominant company has a special responsibility in the maintenance of non-distorted conditions for competition in the market, which implies that those conducts of the dominant company that have the ability to restrict competition, need to have an objective justification, otherwise they will be considered an abuse;
- the fact that a specific behaviour is an abuse depends on it economic features, and not from the intention of its author (thus, even if a certain conduct does not have any anticompetitive object or intention, it is an abuse if it is susceptible to restraining competition, regardless of whether it reaches this end);
- that in no circumstances is the causation of effects required, and even less so a quantification of damages to competitors; and
- that the conduct mentioned in articles 102 TFEU and 2 LDC are mere examples, not an exhaustive list of all the possible types of abuses of dominance.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices, as recognised by the SCAs (*Fonogramas*, 2008; *Pompas Fúnebres del Baix Llobregat*, 1995). Nevertheless, the vast majority of cases dealt with by the SCAs are exclusionary abuses. Although the SCAs sometimes appear to be somehow reluctant to take action against exploitative abuses, as they consider that they may be better dealt with by legislation on consumers' protection, there are cases in which it has dealt with such type of conduct (*SGAE–Conciertos*, 2014).

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The SCAs practice clarify that a link must exist between dominance and abuse (*Interflora*, 1999). In fact, the relevant test is whether the conduct of a dominant company has or may have influence or intends to have an influence the structure of a particular market in which competition is already weakened because of the presence of the dominant company (*Airtel/Telefónica*, 1999). However it is important to note that the abuse does not require the exercise of market power by the dominant company: for instance, the same exclusive agreement, which is perfectly legal for a non-dominant competitor, may be an abuse if entered into by a dominant undertaking.

Furthermore, the SCAs have also fined as abuse of dominance conducts that occurred in dominated markets, but that had effects in a non-dominated market, that is, abuses in 'neighbouring markets' (*Asempre/Correos*, 2004 and *Tubogas/Repsol*, 2002).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The legislation provides for exemptions to abuse of dominance in cases in which the conduct from the dominant company is required by legal provisions (legal exemption). There is also the so called de minimis exemption, for those abuses of dominance that do not have a significant impact in the markets. Unfortunately, there is no guidance or case law clarifying in which circumstances an abuse of dominance will be exempted as a de minimis abuse.

An alleged abusive conduct can also be deemed lawful and not be prohibited if an objective justification is provided by the dominant firm. In this sense, it is also possible to invoke efficiency gains (*SAN Unión Española de Explosivos*, 2004; and *SAN Hidro-eléctrica de L'Empordá*, 2003).

In addition, the SCAs have consistently held that dominant firms must vigorously compete at arm's length in the marketplace. For this reason, although the SCAs have not formally adopted the theory of

'meeting competition', they may take it into account when assessing whether certain behaviour of a dominant firm may be justified.

Specific forms of abuse

14 Rebate schemes

Rebate schemes are considered abusive by the SCAs if they are fidelity-enhancing, not related to costs (*Axion/Abertis*, 2009; Asempre/Correos, 2004; *Iberia*, 2002; and *COFAS*, 1997) or discriminatory (*SGAE*, 2012; *Roca Radiadores*, 1995).

15 Tying and bundling

Making the conclusion of contracts subject to acceptance by the other party of supplementary obligations which, by their nature or according to commercial market practice, have no connection with the subject of such contracts may be considered as an abuse (*Gas Natural*, 2003 and *Arquitectos Madrid*, 1999).

16 Exclusive dealing

Non-compete obligations, exclusive dealing, single branding and similar contractual obligations can amount to an abusive practice depending on the specific circumstances of the case (*Airtel/Telefónica*, 1999 and *BT/Telefónica*, 1999).

17 Predatory pricing

Following the judgment of the European Court of Justice in *Akzo* (1991), the SCAs have found predatory pricing to constitute an abuse under the LDC (*Canarias de Explosivos*, 2008 and *Tabacos de Canarias*, 1999).

For example, in *Tabacos de Canarias*, 1999, the SCAs considered that a company had abused its dominant position by pricing below the production cost. In addition, quoting *Azko*, they stated that a price below the total cost but above the variable cost will only be deemed predatory when the dominant firm does so with the intention to eliminate a competitor or dissuade it from operating in the market.

In line with EU law, although recoupment is not a necessary element to determine whether the dominant firm has abused its dominant position, it is an element that can assist in establishing that a plan to eliminate a competitor exists where prices below total costs but above variable costs are applied.

18 Price or margin squeezes

A price squeeze can occur when a vertically integrated firm is dominant in an upstream market and leaves an insufficient margin between its upstream and downstream products for a competitor to compete in the upstream (horizontal price squeeze) or in the downstream market (vertical price squeeze). The SCAs have found that price squeeze practices amount to an abuse when applied by dominant firms. That applies to horizontal price squeeze (*Iasist/3M*, 2002) and to price squeezes in vertical markets. However, in recent years, there have been several price squeeze investigations in the telecoms sector, and all of them have been closed by the SCAs without finding clear evidence of an infringement (*Telefónica*, 2015; *Uni2/Telefonica Móviles*, 2004; *WorldCom/Amena*, 2004; *WorldCom/Vodafone*, 2004).

19 Refusals to deal and denied access to essential facilities

'Unjustifiably refusing to meet a demand to purchase products or services' may amount to an abuse of a dominant position in Spain (*Istobal*, 2016; *Mundial Fútbol* 98, 2002; or *Eléctrica Caldense* 1999).

Moreover, refusal to supply is to be construed in broad terms, including, for example, successive and unjustified delays in meeting demand (*STS Telefónica*/3C, 2003).

Regarding the essential facilities doctrine, under which the owner of a facility may, by virtue of such ownership, have a dominant position on a market and the refusal to give access to it to competitors on non-discriminatory terms may therefore constitute an abuse, the SCAs practice is in line with EU law (*Funerarias Madrid*, 2001, case that was dismissed by the SCA; and 3C, 1995).

20 Predatory product design or a failure to disclose new technology

There are no precedents in which the SCAs have dealt with such conducts, but in theory, there may be circumstances in which such behaviours would amount to an abuse of dominance under Spanish Competition Law.

21 Price discrimination

Applying dissimilar conditions to equivalent transactions in trading or service relations, thereby placing some competitors at a competitive disadvantage compared to others, may be considered as an abuse (*Renfe Operadora, 2017; AGEDI/AIE, 2012*). However, beyond such potential abuse, please note that there are no specific price discrimination laws in Spain.

22 Exploitative prices or terms of supply

Directly or indirectly imposing unfair prices or other unfair trading or service conditions may be considered as an abuse (*SGAE-Conciertos*, 2014; *AGEDI/AIE*, 2008). For example, in *Canarias de Explosivos*, 2008, the SCAs stated that although excessive prices are not per se abusive, under certain circumstances the dominant firm may be able to impose a price that has not a reasonable relation to the economic value of the transaction, and such behaviour may amount to an abuse of dominance.

In addition, the SCAs have established that, in very specific circumstances, price increases by dominant companies may amount to an abuse when such increases are not justified (for example, not related to cost as in *Empresas Eléctricas*, 2005 or *Transportes Ría de Vigo*, 2001).

23 Abuse of administrative or government process

Abuse of government process could be dealt with by the SCAs, although there are no precedents. This particular type of abuse may also be dealt with under the Unfair Competition Act.

24 Mergers and acquisitions as exclusionary practices

There are no precedents of mergers or acquisitions being considered as exclusionary practices under article 2 LDC. In fact, the SCAs have made clear that article 2 LDC applies to behaviour rather than to structural changes in the market (*Radio Fórmula*, 1997; *Mölnlycke*, 1993).

25 Other abuses

The conducts mentioned in articles 102 TFEU and 2 LDC are mere examples, not an exhaustive list of all the possible types of abuses of dominance, therefore, the SCAs can sanction other types of conducts that are not included in the said articles.

As a way of example, the SCAs condemned certain advertising practices as abusive conduct in *Retevisión/Telefónica*, 2000, where the SCAs found that a dominant company had abused its dominant position by delaying and stifling competition through a number of practices, including an advertising campaign on TV and newspapers. However, this decision was overruled by the Spanish Supreme Court.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The national authorities entrusted with the enforcement of article 2 of the LDC are as follows.

The National Markets and Competition Commission (CNMC)
In October 2013, the Spanish competition, energy, telecoms, railways, audio-visual, airports and postal regulators merged into a single newly created authority, the National Markets and Competition Commission (CNMC).

The CNMC has two levels of bodies: the investigation body and the decision-making body.

The investigation body is composed of four investigation directorates (Competition; Energy; Telecommunications and Audio-visual Sector; and Transport and Postal Sector). The Competition Directorate is the body charged with the investigation powers of competition law cases, with effects of potential effects beyond the territory of one specific region. The other three directorates are charged with investigation powers in their corresponding sectors from a regulatory point of view.

Update and trends

Although the CNMC is a young authority, created in 2013, there is consensus in the Spanish parliament for its division into two different authorities: an independent competition authority also responsible for consumer protection at national level, and another independent regulatory authority responsible for every regulated sector but the financial sector (for instance, and among others, responsible for the regulatory supervision of the telecoms, energy, transport and gambling sectors). This new institutional framework may be in place in the second half of 2017.

Regarding relevant trends in abuse of dominance enforcement, since the creation of the CNMC the number of sanctioning cases and the amount of fines for abuse of dominance have decreased if compared with the previous period. However, although this does not lie in the fact that the CNMC is less committed or interested in abuse of dominance cases, which continues to be one of its priorities, it is true that the CNMC has been very cautious when assessing potential abuse of dominance cases, first of all because the top priority remains cartel prosecution, and secondly because private enforcement of the abuse of dominance rules has been effective in Spain. In this regard, it is to be expected that the SCAs remain very strict in the analysis of the economic foundation of any allegations of dominance or abuse or both, and that they continue focusing on cases with a sensible impact in the way markets work. At the same time, regional competition authorities are increasing their prosecution of abuse of dominance cases, in particular in refusal to supply or essential facility cases (for instance, in the funerary sector), and third parties suffering damages as a consequence of alleged abuses of dominance will increasingly engage in stand-alone actions before the Spanish courts.

As to the business sectors on which the SCAs might focus in the coming future, the CNMC's Plan of Action for 2016 mentions that it will pay special attention to certain sectors, such as the digital economy, the pharma sector, audiovisual rights, the agricultural sector, the finance sector or telecommunications and pay TV markets.

The decision-making body is the Council, which comprises 10 members named by the government, proposed by the Minister for Economy, between prestigiously renowned and competent professionals. They are appointed for a six-year non-renewable period and are subject to a strict system of incompatibilities. It is organised into two chambers: one dedicated to competition matters (Competition Chamber) and another for the supervision of regulated sectors (Chamber for Regulated Supervision). The main chamber is composed of all the members of the Council and presided by the President, and decides in specific relevant cases, such as those in respect of which there is a difference of opinion between the Competition Chamber and the Chamber for Regulated Supervision, or those that, on account on their special impact on the competitive functioning of the markets or activities subject to supervision, are expressly claimed by the main chamber for itself.

The Regional Competition Authorities (RCAs)

Law 1/2002 of 21 of February 2002 allows for the creation of RCAs, which have jurisdiction in cases in which the conduct being investigated does not affect more than one region.

National powers of investigation and enforcement do not differ substantially from those of the European Commission. SCAs (both at national and regional level) may carry out the investigations necessary to ensure proper compliance with the law.

In the course of their inspections officers may examine, obtain copies or take extracts from books and documents, including accounting documents, irrespective of the medium in which they are stored. Original documents can be retained for a maximum of 10 days. In addition, officers can also require on-the-spot explanations as well as conduct interviews with representatives of the investigated undertakings, although interviewees are not obliged to provide answers that would constitute an admission of infringement, but must, however, defer to questions of facts.

Officers have the right to enter premises, including registered offices of the company and company cars, either with the consent of the occupants or by means of a court order. The SCAs must request such a court order from the Court for Administrative Proceedings, which must make its decision within 48 hours.

The LDC enables the SCAs (both at national and regional levels) to impose a fine of up to 1 per cent of the company's turnover in the preceding business year in the event that the company obstructs or impedes an investigation by the SCAs.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The SCAs can request undertakings to cease anticompetitive behaviour and also require them to remove the effects of such conduct, but it cannot impose structural remedies in abuse of dominance cases (unlike in merger control proceedings).

It is also possible for the SCAs to terminate the investigations through commitments, without imposing a fine or recognising liability for infringement. It is important to note that this is a faculty of the SCAs and not a right of the parties being investigated. In this regard, the SCAs issued a communication in 2011 regarding the use of this procedure by the SCAs, according to which, the parties must request the *terminación convencional* as soon as possible, and always before the statement of objections. The communication also points out that it will not allow this procedure in cases in which the effect on competition has lasted for a significant period of time.

The SCAs can impose fines on undertakings which violate article 2 LDC or article 102 TFEU of up to 10 per cent of their total annual turnover in the previous year if the abuse is carried out by an undertaking that operates in a recently liberalised market, has a market share near monopoly, or that enjoys special or exclusive rights. In any other circumstances the maximum fine that can be imposed on the infringing undertaking is 5 per cent. In this regard, since the Spanish Supreme Court issued a judgment challenging the criteria used by the CNMC under its guidelines for calculation of fines, the method of calculating fines in Spain is no longer in line with that of the EU.

In addition, the LDC also allows the SCAs, in cases where an undertaking commits an infringement, to impose a fine of up to about €60,000 upon directors that have been personally involved in the adoption of the anticompetitive conduct, unless such legal representatives or directors of the company made clear their opposition to such conduct.

Although eventually overruled by the Supreme Court, the highest individual fine ever imposed by the SCAs for abuse of dominance in Spain was €57 million upon Telefónica in *Astel/Telefónica* (2004). Nowadays, the highest individual fine imposed by the SCAs for abuse of dominance amounts to €46.5 million on Telefónica in 2012. In addition, two abuse of dominant position cases resulted in the imposition of the maximum 10 per cent fine (*Canarias de Explosivos and Estación Sur de Autobuses*, 2008).

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The SCAs are fully entitled to impose sanctions without prior approval of or petition to a court or other authority. Such fines can then be appealed before the relevant courts (see question 28).

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The legislation and rules covering abuse of dominance are widely enforced by the SCAs. Since the entry into force of the LDC in September 2007, the authorities have intensified its enforcement of the abuse of dominance provisions, significantly increasing the level of fines imposed for this type of infringement.

In this regard, it is worth noting that, at national level, in the period between 2002 and 2006, the SCAs adopted 24 decisions relating to abuse of dominant position cases, in which they fined companies a total of around €70 million. However, in the period between 2007 and

2012, also at national level, the SCAs adopted 36 decisions, awarding fines to the value of €184 million. Although some of these decisions and fines were revised at a later stage in court, the difference between the 2002–2006 and 2007–2012 periods, both in terms of decisions and fines, gives an idea of the increase in applications on the part of the SCAs for dominant position cases following the entry into effect of the LDC in September 2007.

For instance, in 2012, the SCAs imposed the highest individual fines ever for the abuse of dominance on Telefónica, Vodafone and Orange in the wholesale market of termination of SMS and MMS from 2000 to 2009. The amount of the fines were €46.5 million on Telefónica, €43.5 million on Vodafone and €29.9 million on Orange. Also, in 2009, the SCAs imposed a fine of €36 million on the top five electricity utilities for the abuse of collective dominance; a fine of €22 million on Abertis Telecom, a telecommunications infrastructure services provider; and in 2012, a fine of €23 million to Endesa, one of the main Spanish electricity utilities.

However, since the creation of the CNMC in 2013, the enforcement record of abuse of dominant position cases have decreased, with fewer decisions and lower fines between September 2013 and the end of 2016 (for instance, at national level, in this period there have been seven sanctioning decisions and fines amounting to about €16 million).

The average duration for abuse of dominant position cases is very variable and can last from just under a year to over two years, depending on the complexity of the case, the number of parties involved in it, whether a sanction is imposed or not, etc. The average for the past few cases analysed by the SCAs at national level is around 18 months.

The most recent high-profile dominance case has been *HP/Oracle*. The case resulted in Oracle being sanctioned by the Spanish High Court (Audiencia Nacional). This is a high-profile case and the most important abuse of dominance case in the technology sector in Spain. In fact, this case is the first time that a Spanish court exercised its full jurisdiction in an abuse of dominance case and, against the decision of the SCAs, has found that the company Oracle is dominant and that it abused its dominant position in the market. The decision also analysed, among other things, the situation in which a dominant IT company can discontinue a technology from its platform. In this case, the Spanish High Court has found that Oracle should continue developing new versions of its high performance databases for servers based on the Itanium technology from Intel.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

As a general principle, contracts, or parts of them, entered into by dominant firms that infringe antitrust provisions, including article 2 LDC and 102 TFEU, can be declared null and void by the relevant courts.

Regarding whether it is a specific clause or the entire contract that are invalidated, both options are possible under Spanish law, depending on whether the clause or clauses found abusive are essential to the contract or not. In this regard, it is important to note that no specific rules or development legislation on Spanish Competition Defence Law exist regarding this point. Thus, existing legislation and legal principles from Spanish civil law are to be applied.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Under the LDC, any claim arising from an abuse of a dominant position in Spain or other actions, such as interim measures, damages claims, etc, may be brought before the relevant civil courts.

The vast majority of private enforcement cases for abuse of dominance are related to damage claims, which are relatively common in Spain, in particular, after the SCAs have found an infringement of article 2 LDC or 102 TFEU (follow-on actions).

Regarding other types of measures (such as an order to grant access to an essential facility), the most common course of action is that the SCAs open sanctioning proceedings, in which they analyse the case and take, if applicable, the necessary measures to put an end to the abuse from the dominant company and re-establish the normal conditions of competition. However, there are also precedents of private enforcement regarding this type of measures. Some successful cases include three cases of refusal to supply by holders of broadcasting rights (*Sogecable v Ono, Tenaria and Euskaltel*).

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

It is possible to bring claims against companies responsible for an abuse of dominance under article 2 LDC and/or 102 TFEU. The legal grounds to claim damages is article 1.902 of the Spanish Civil Code.

Regarding the calculation and assessment of damages, there are no specific legal criteria to quantify the damages stemming from a case of abuse of dominance. Accordingly, the general rules for the calculation of damages set out in article 1.106 of the Spanish Civil Code apply, taking into account the actual damage suffered by the companies harmed by the abusive practice and the loss of profit of said company.

In Spain, a number of damage claims deriving from abusive conduct have already been granted. For example, in 2011, Centrica obtained €670,000 in damages as a consequence of Endesa's abuse of dominant position in the electricity distribution market; and in 2010 ONO obtained more than €25 million as a consequence of AVS and Sogecable's abuse of dominant position and unfair competition in the audiovisual market.

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33 Appeals

To what court may authority decisions finding an abuse be appealed?

The decisions from the SCAs can be appealed either before the Spanish High Court if issued by the CNMC, or before the corresponding regional High Court of Justice if issued by a regional competition authority.

In both cases, the decisions that can be appealed include those in which the SCAs have found an abuse, but also the decisions closing an abuse of dominance case because the SCAs consider that the company is not dominant or that it did not abuse its dominant position.

The Spanish High Court or the regional High Courts of Justice can review the facts and the law of the case. A good example is the judgment of September 2015, in which the Spanish High Court annulled the SCAs' decision of February 2013 rejecting HP's complaint against Oracle for abuse of dominant position in the market for relational databases. In that case, the court reviewed the facts of the case and replaced the SCAs' analysis with their own by declaring an infringement of the applicable dominance rules where the SCAs had not found one.

In turn, rulings from the Spanish High Court and the regional High Courts of Justice can be appealed before the Spanish Supreme Court under certain circumstances.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Yes, article 3 LDC applies to the unilateral conduct of non-dominant firms that meets the following cumulative conditions: (i) the conduct qualifies as an act of unfair competition under the Unfair Competition Law (Law3/1991); and (ii) affects the public interest by distorting competition (*Endesa*, 2012; *Iberdrola Sur* 2012). Companies liable of an infringement of article 3 LDC can be fined up to 5 per cent of the company's turnover in the preceding business year.

The LDC is not stricter than article 102 TFEU as regards abuse of dominance.

Switzerland

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act) applies to unilateral practices of market dominant undertakings. According to article 7 of the Cartel Act, market dominant undertakings act unlawfully if they abuse such position and thus hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. In addition, also the Federal Price Surveillance Act of 20 December 1985, inter alia, is relevant for market dominant undertakings.

In general, the Cartel Act is autonomous Swiss law and, as such, to be construed independently from European Union (EU) competition law; it shall, however, be used as an interpretative aid in case the legislator intended an alignment by setting corresponding rules (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*).

This holds particularly true for article 7 of the Cartel Act, which was shaped on the basis of article 101 of the Treaty on the Functioning of the European Union. Therefore, according to the Federal Administrative Court, it is not only the responsibility of Swiss competition authorities and courts, but also of undertakings, to pay due attention to European competition law by conducting a reasonable comparative legal analysis (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*). However, this does not mean that the (often subtle) differences between these two jurisdictions should be neglected, particularly regarding the sanctioning of violations of article 7 of the Cartel Act.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 4 paragraph 2 of the Cartel Act defines a dominant undertaking as 'one or more undertakings that are able, as suppliers or consumers, to behave to a significant extent independently of the other participants (competitors, suppliers or consumers) in a specific market'. Dominance is characterised by freedom of action of the concerned undertaking. Dominance could be either individual or collective.

The Cartel Act does not contain any assessment criteria. In practice, the main elements that are taken into account when assessing dominance are market shares, the existence of barriers to entry or expansion and potential competition, the market structure as well as the countervailing buyer power. These elements constitute mere indications and are not, as such, sufficient to establish a dominant position, which should be assessed in the light of all relevant circumstances relating to a particular case.

In specific circumstances, the concept of dominance could also cover vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers (see, for example, *Comco, RPW/DPC* 2005/1, p. 160 – *CoopForte; Comco, RPW/DPC* 2008/4, p. 572 – *Tarifverträge Zusatzversicherung Kanton Luzern*).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the Cartel Act is to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. The objective is not limited to economic aspects: general public interest considerations are taken into account as well.

However, the law grants the Competition Commission (Comco), which is the authority primarily in charge of pursuing violations of Swiss competition law (including abuses of dominant positions), solely with the power to assess economic consequences of restrictions of competition and concentrations between undertakings. It is up to the Swiss Federal Council (the Swiss government) to assess the balance with general public interests. Upon request by the undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco may be authorised by the Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons (article 8 Cartel Act). However, to date, this has never happened.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There is sector-specific regulation of dominance but, however, in constant interplay with the Cartel Act when it comes to the assessment of a dominant position. Indeed, sector-specific regulation such as telecommunications or energy law does not preclude the application of the Cartel Act, but it should be taken into account in the latter's application (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). Only sector-specific provisions that aim at effectively excluding competition (but not other policy regulations) might lead to the non-applicability of the Cartel Act (Federal Supreme Court, RPW/DPC 2015/1, p. 131, *Hors-Liste Medikamente*).

The Federal Act on Telecommunication of 30 April 1997 lays down specific ex ante obligations for dominant telecommunication providers. The latter must provide access to their facilities and their services to other providers in a transparent and non-discriminatory manner at cost-oriented prices. They may bundle their services, provided they also offer the services included in the bundle individually.

The Federal Act on Radio and Television of 24 March 2006 provides for special measures in the area of radio and television in cases where an undertaking active in the radio and television market has jeopardised the diversity of opinion and offerings because of an abuse of its dominant position.

The Federal Act on Electricity Supply of 23 March 2007 lays down specific regulation for historic monopoly electricity suppliers in order to ensure access to other providers. The Federal Postal Act contains similar provisions.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The Cartel Act and, therefore, the provisions on dominance apply to any undertaking (private or public entities) as far as they exercise market power (article 2 paragraph 1 of the Cartel Act) and that are commercially active irrespective of their legal or organisational form. The limitation that the Cartel Act only applies to undertakings that 'exercise market power' should, however, not be overestimated. In terms of article 7 of the Cartel Act, finally, it is decisive whether an undertaking has a dominant position in a relevant market, and this term is defined in article 4 paragraph 2 of the Cartel Act (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*; with regard to the authorisation of an abusive conduct for compelling public interest reasons, see question 3).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

With regard to abusive conduct, the Cartel Act only applies to undertakings that hold a dominant position on a relevant market. Unlike, for example, the Sherman Act, the Cartel Act does not cover the attempt to monopolise or acquire a dominant position. Indirectly, however, the merger control provisions of the Cartel Act provide for an ex ante control of concentrations that create or strengthen a dominant position liable to eliminate effective competition.

According to article 7 of the Cartel Act, it is not unlawful for an undertaking to hold a dominant position. This provision only bans abusive conduct of dominant undertakings as exemplified in article 7 paragraph 2 of the Cartel Act.

The Cartel Act does not contain any behavioural provision specifically dealing with abuses in relation to the concept of economic dependence. However, the concept of dominance could, under specific circumstances, also cover vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers (see, question 2).

Furthermore, the Federal Act on Unfair Competition of 19 December 1986 applies to certain types of conduct by non-dominant undertakings. One example is the systematic undercutting of prices, which is considered unlawful and may result, upon request, in criminal prosecution.

Finally, the Price Surveillance Act, which empowers the Price Supervisor to control excessive prices, particularly in regulated markets, also applies to undertakings with market power.

7 Collective dominance

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

As mentioned in question 2, dominance is defined as a position held by 'one or more undertakings'. Therefore, collective dominance is also covered by the law. However, the Cartel Act does not provide for any specific definition of collective dominance, whose characteristics are developed by the decision-making practice of the Comco.

The first case that dealt with collective dominance was the merger between Revisuisse Price Waterhouse and STG-Coopers & Lybrand (RPW/ DPC 1998/2, p. 214). In the *Mobilfunkmarkt* case (RPW/DPC 2002/1, p. 97), the Comco examined the existence of collective dominance in parallel to the existence of an anticompetitive agreement. In doing so, the Comco goes through a static analysis, and examines the market structure, followed by the assessment of the market conduct of the undertakings. According to the Secretariat of the Comco (Secretariat; with regard to the role of the Secretariat, see question 26), the criteria for the finding of collective dominance are similar to that of collusion (horizontal anticompetitive agreements; see RPW/ DPC 2007/3, p. 364, final report of the Secretariat of the Comco in the *Konsumkredit* matter).

In the *Kreditkarten-Akzeptanzgeschäft* case (RPW/DPC 2003/1, p. 106), the Comco affirmed collective dominance of acquirers of credit cards, which abused this collective dominant position. The Comco listed the following criteria, which shall be applicable to an assessment of potential collective dominance: market concentration; market shares; market transparency and stability; entry barriers; symmetry of interests, products and costs between undertakings; countervailing buyer power; and price elasticity of demand.

Another in-depth analysis with regard to collective dominance was carried out in the pork-meat market (RPW/DPC 2004/3, p. 674, *Markt für Schlachtschweine*).

The assessment of the Comco was completed with an empirical economic analysis of price margin development in the industry, which allowed the Comco to reject the existence of collective dominance.

Also in the case of the planned concentration between France Télécom SA and Orange Communications SA, the Comco used the above-mentioned criteria (RPW/DPC 2010/3, p. 499, *France Télécom SA/Sunrise Communications AG*). In this case, the Comco prohibited the concentration between these two companies because in its assessment, the new company would, together with Swisscom, have assumed a collectively dominant position in the mobile communications market and in the absence of new competitors entering the market, the companies would have had no incentive to challenge the position of competitors by means of price reductions.

In a recent case, the Comco has investigated on a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. The Comco finally considered that there were not enough elements to retain that these undertakings individually or jointly hold a dominant position (RPW/DPC 2016/1, p. 67, *Online-Buchungsplattformen für Hotels*). However, in its ruling dated 19 October 2015, the Comco prohibited the three operators of booking platforms to extensively restrict hotels in their supply policy by imposing comprehensive best price rules in the sense of illegal anti-competitive agreements (RPW/DPC 2016/1, p. 67, *Online-Buchungsplattformen für Hotels*).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The dominance provisions apply also to purchasers. The assessment of dominance goes through the traditional criteria. However, under specific circumstances, the concept of economic dependence could apply to strong purchasers even though they do not hold a dominant position in the classical sense (see question 6).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Article 11 of the Merger Control Ordinance of 17 June 1996 defines the relevant product market as comprising all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use. It also defines the relevant geographical market as the area in which on the one hand consumers purchase and on the other suppliers sell the goods or services that constitute the relevant product market. This provision also serves as the basis for defining the relevant market in dominance cases. In principle, the relevant test for market definition is the substitutability of products and services and, in particular, the cross-price elasticity and small but significant and non-transitory increase in price (SSNIP) test (see Federal Supreme Court in RPW/DPC 2013/1, p. 114, *Publigroupe*).

The Comco also examines whether the market presents the characteristics of the 'Cellophane Fallacy' (ie, whether a market is erroneously defined too broad due to the presence of already monopolistic prices; see, for instance, RPW/DPC 2005/3, p. 458, *Bio-Suisse*; RPW/ DPC 2006/2, p. 261, *Emmi AG/Aargauer Zentralmolkerei* AG AZM; RPW/DPC 2015/1, p. 105, *Valora Holding AG/LS Distribution Suisse SA*).

Neither the law nor the case law refers to any threshold above which an undertaking must be considered to be dominant. As a rule of thumb, market shares below 30 per cent should not be sufficient for an undertaking to hold a dominant position. The 'critical' threshold, in general, is set at a market share of above 50 per cent, where an undertaking could hold a dominant position. For example, a market share

of 50 per cent was deemed sufficient in the *Plakatierung in der Stadt Luzern* case (RPW/DPC 2003/1, p. 75, *Plakatierung in der Stadt Luzern*). Market share thresholds, however, constitute mere indications and are, stand-alone, never sufficient to prove dominance. In practice, the Comco still maintains an in-depth analysis of the market characteristics even though the market definition reveals a market share of 100 per cent (RPW/DPC 2008/2, p. 242, *Terminierungsgebühren beim SMS-Versand via Large Account*). In particular, when barriers to entry are low and potential competition is strong, high market shares do not, per se, justify the finding of a dominant position.

The Comco has denied dominance, for example, in the case of a market share of 69 per cent, where the company had lost market shares owing to the entry of new competitors (RPW/DPC 2002/1, p. 97, *Mobilfunkmarkt*). In another case, a market share of 50 to 70 per cent was not sufficient to find dominance, inter alia, because of the strong competition from the two other (actual) competitors. The market test had shown that the larger company was unable to raise its prices and thus to ignore competition on the market (RPW/DPC 2003/2, p. 240, *Johnson & Johnson*).

On the other hand, public hospitals were found to be dominant with a market share of 37 to 48 per cent. In this case, the absence of potential competition and the existence of particular dependency relationships between public hospitals and insurers in the private insurance field justified the finding of dominance (RPW/DPC 2008/4, p. 544, *Zusatzversicherung Kanton Luzern*).

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

In general, dominant undertakings are considered to act unlawfully 'if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners' (article 7 paragraph 1 of the Cartel Act). Article 7 paragraph 2 of the Cartel Act lists examples of conduct that may be considered as abusive (see question 6).

The Cartel Act contains no per se prohibitions. The abusive character of a conduct is to be determined on a case-by-case basis, taking into account the specific market conditions. In practice, the Comco and the courts examine the effects of a specific conduct on the market, particularly in cases where the conduct of a dominant undertaking falls under the categories covered by article 7 paragraph 2 of the Cartel Act. The former Competition Appeal Commission recognised that it is the anti-competitive effect of a practice that justifies its prohibition, which position is also confirmed by the Federal Supreme Court's requirement that examples of article 7 paragraph 2 of the Cartel Act should be applied in conjunction with its paragraph 1 (Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*).

Particularly when it comes to conduct solely covered by the umbrella clause of article 7 paragraph 1 of the Cartel Act, the recent decisions of the Comco show a trend towards an effects-based approach. Indeed, in its Swisscom decision, the Federal Administrative Court imposed a substantial fine on Swisscom for a price squeeze in the broadband internet sector (ADSL), which falls solely under the general provision of article 7 paragraph 1 of the Cartel Act (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, P. 561, *Preispolitik Swisscom ADSL*).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Article 7 of the Cartel Act covers both exploitative and exclusionary practices. Exclusionary practices target mainly competitors, while exploitative practices aim at harming commercial partners or consumers. However, the distinction between exploitative and exclusionary practices is rather academic.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In practice, the Comco requires a link between dominance and abuse. However, the causal link is not understood as limiting the finding of an abuse to the market in which the undertaking is found dominant. The practice and legal doctrine accepts that unilateral conduct of dominant undertakings may have an impact (or negative effect) in adjacent markets (RPW/DPC 2006/4, p. 625, *Valet Parking*). In the *Valet Parking* case, the refusal of Zurich Airport to grant authorisation for parking within the airport to competitors was considered as an abuse of a dominant position, even though the behaviour had a negative effect on the off-airport parking market (ie, outside the airport).

On the other hand, the causal link between dominance and a possible abusive behaviour, in itself, is not sufficient to effectively establish an abusive conduct. The behaviour itself should comprise separate elements that qualify it as abusive. In the context of unfair (or excessive) prices where the dominance itself is the cause of the dominant undertaking's power to set monopolistic prices, this close link between dominance and price setting is not sufficient to prove that the price was abusive. In addition, it should be demonstrated that the dominant undertaking was indeed able to coerce clients to accept monopolistic prices (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). Yet, there is considerable legal uncertainty as to what kind of coercion the dominant undertaking must have been able to impose.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Although the law does not provide for defences, the case law recognises the possibility to successfully invoke defence arguments such as legitimate business reasons. Ultimately, the interests of the individual undertaking have to be balanced with the interests in the 'institutional' competition on the market (Federal Supreme Court, RPW/DPC 2013/1, p 114, *Publigroupe*). In any case, however, it is crucial that the specific conduct is proportional, namely, that it does not go beyond what is required to achieve the legitimate business reasons' goal.

The former Competition Appeal Commission has already confirmed the possibility of invoking legitimate business reasons, which might be retained if the company's conduct is justified to protect its objective commercial interests, and if the conduct under investigation is not substantially different from what would have prevailed in a competitive market (RPW/DPC 2002/4, p. 276, *Entreprises Electriques Fribourgeoises*). The Competition Appeal Commission mentioned legitimate business reasons, including the necessity to ensure the quality of products, efficiency or technical reasons (eg, lack of capacity).

In *TicketCorner* (RPW/DPC 2004/3, p. 778), the Comco discussed efficiency gains in the administration of ticket sales, in the improvement of seller agents' training, and the prohibition of free riding. However, the exclusivity agreements between the agent seller (TicketCorner) and the event organisers were not considered necessary to achieve such efficiency gains (see also, decision B-3618/2013 of the Federal Administrative Court of 24 November 2016 – *Vertrieb von Tickets im Hallenstadion Zürich*).

Specific forms of abuse

14 Rebate schemes

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade by a dominant undertaking is unlawful.

Fidelity and target rebates are, under certain circumstances, considered as an abuse of dominance. In principle, quantitative rebates based on cost efficiencies are considered to be legitimate. Rebates based on quality criteria are not necessarily considered unlawful, in particular, if such rebates are justified by true benefits, and that customers are not hindered in their choice of another competitor.

Rebate and pricing schemes that discriminate against some customers may be considered also as abusive price discrimination (see, for example, RPW/DPC 2008/3, p. 385, *Publikation von Arzneimittelinformationen*, where only bigger customers above a specific threshold benefitted from special agreements). In the *SDA* case, the Comco fined the leading Swiss news agency with an amount of about 1.9 million Swiss francs for offering certain customers exclusivity rebates, namely, discounts of about 10 to 20 per cent if these customers agreed to purchase several specific media services from SDA as a package (RPW/DPC 2014/4, p. 670, *Preispolitik und andere Verhaltensweisen der SDA*). In general, rebates should not aim at impeding the freedom of customers to change the supplier (in particular, loyalty rebates), and quantity rebates should be economically justified, for example, owing to existing economies of scale.

15 Tying and bundling

The Cartel Act considers as abusive any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services (article 7 paragraph 2(f)). The Comco has investigated tying practices on several occasions, often denying the finding of an abuse, however. The Comco considers that the tying and bundling of two products have negative effects and, therefore, are abusive if:

- the undertaking holds a dominant position on one of the markets;
- the tying and the tied products are distinct products;
- the dominant undertaking makes the acquisition of the second product conditional upon the acquisition of the first product;
- the tying or bundling have anticompetitive effects on the tied (second) market; and
- the tying is not justified for legitimate business reasons (RPW/DPC 2011/1, p. 96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*).

16 Exclusive dealing

Exclusive dealing practices may be covered by the general clause of article 7 paragraph 1 of the Cartel Act.

On 24 November 2016, the Federal Administrative Court annulled the Comco decision to close the investigation against the ticketing and live entertainment provider Ticketcorner AG and the operator of the event location Hallenstadion in Zurich (Aktiengesellschaft Hallenstadion [AGH]) in an interim decision. The Federal Administrative Court found (likely) abuses of the dominant positions of Ticketcorner and AGH. It also held that the obligation for event organisers to sell at least 50 per cent (resulting de facto in 100 per cent) of all tickets for events in the Hallenstadion via Ticketcorner, or the agreement between Ticketcorner and AGH in that regard, respectively constitute illegal anticompetitive agreements. In its decision, the Federal Administrative Court handed down the matter to the Comco This matter is currently pending before the Federal Supreme Court (Federal Administrative Court, 24 November 2016, B-3618/2013, *Vertrieb von Tickets im Hallenstadion*).

17 Predatory pricing

The law considers as unlawful any undercutting of prices or other conditions directed against a specific competitor (article 7, paragraph 2(d) of the Cartel Act). The Comco has investigated several cases of alleged predatory pricing, denying predation, however. There is no presumption that prices below the undertaking's own total costs are predatory; the practice is covered by the undercutting provision only when the undercutting is part of a strategy to exclude competitors (RPW/DPC 2004/4, p. 1002, *Cornèr Banca SA/Telekurs AG*). In principle, however, the Comco may infer that prices under average variable cost are directed against competitors.

In the *Radio- und TV-Markt St Gallen* case (RPW/DPC 2002/3, p. 431), the Comco stated four conditions that must be fulfilled to find an abuse of dominance in the form of predatory pricing: the undercutting must be systematic; should be directed towards a specific, actual or potential, weak competitor; should not allow the company to maximise its profits in the short term; and the company should be able to raise the prices again.

The Comco considers the 'recoupment' of lost profits as a condition for finding an unlawful predatory pricing strategy (see, for example, RPW/DPC 2004/4, p. 1002, *Cornèr Banca SA/Telekurs AG*).

18 Price or margin squeezes

Price or margin squeezes may be considered as abuses of a dominant position. The Comco defines price squeeze as a situation where a vertically integrated undertaking sharply lowers retail prices in comparison to its wholesale prices, so that comparably efficient competitors would not be able to compete and make profits in the retail market.

The leading case with regard to price squeezing is the *Swisscom* decision, in which the Comco fined Swisscom about 220 million francs for price squeezing in the ADSL market (RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom ADSL*). The Federal Administrative Court upheld Comco's finding but reduced the fine to about 186 million francs (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*). The Comco based its analysis on the profitability of activities of the vertically integrated company and the retail margins of the Swisscom subsidiary active in the high-speed internet sector. In addition, the Comco focused its analysis on the retail margins of a reasonably efficient competitor (the imputation test). The Comco concluded that the wholesale prices applied by Swisscom did not allow its competitors to obtain sufficient margins to compete in the market for high-speed internet. The abusive and anticompetitive effect was also corroborated by Swisscom's profits in the wholesale sector and the losses incurred by its subsidiary in the retail market for ADSL services.

Recently, the Comco fined Swisscom about 7.9 million Swiss francs for a price squeeze in the wide area network sector. Indeed, in 2008 the Swiss Post issued a tender process for services with regard to the networking of its offices. Swisscom offered a price that was 30 per cent lower than its competitor's price, taking advantage of the fact that, in order to provide its facilities, it has to acquire prior facilities from Swisscom on a wholesale level. Swisscom fixed the price for the prior facilities so high that its competitors were unable to compete with their downstream services. By the same token, the Comco found that Swisscom imposed excessive prices (RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung*).

19 Refusals to deal and denied access to essential facilities

Article 7 paragraph 2(a) of the Cartel Act considers as unlawful any refusal to deal (eg, refusal to supply or to purchase goods), which is likely to foreclose competition. In the practice of the Comco, four conditions must be fulfilled to qualify a refusal to deal as abusive: first, the dominant undertaking must refuse to supply a product; second, this product has to constitute an input objectively necessary to compete in a neighbouring (upstream or downstream) market; third, the refusal has a foreclosure effect; and fourth, the refusal cannot be justified for legitimate business reasons (RPW/DPC 2011/1, p. 96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*).

Watt/Migros was one of the first leading cases finding an abusive refusal to deal. An electricity distribution network that was a local monopoly refused to carry electricity acquired by Migros from Watt, a competing undertaking. The refusal to transport electricity was considered as an abuse of a dominant position (RPW/DPC 2001/2, p. 255, *Watt/Migros-EEF*). The decision of the Comco confirmed the application of the Cartel Act to regulated industries; it was upheld by the Competition Appeal Commission and the Federal Supreme Court.

Another leading case on refusal to deal was *ETA SA Manufacture Horlogère Suisse* (RPW/DPC 2005/1, p. 128). ETA notified its customers that it would phase out (ie, gradually reduce) the supply of rough watch movements (movement blanks), and that it would supply only already assembled watch movements in the future. The reduction and interruption of the supplies of an input was considered as an abuse of a dominant position, in particular because ETA intended to enter the market itself. The investigation was closed following commitments offered by ETA to increase the quantity supplied to its customers and to prolong the interim supply period by three years. The Secretariat of the Comco (as to the role of the Secretariat, see question 26) was also investigating the decision of Swatch to cease to supply third parties with mechanical watch movements and assortments (RPW/DPC 2014/1, p. 215). In the course of this investigation, the Comco issued interim measures to ensure the supply of third parties with movements and assortments during the investigation (RPW/DPC 2011/3, p. 400, *Terminierungspreise im Mobilfunk*). These interim measures were confirmed by the Federal Administrative Court (RPW/DPC 2012/1, pp. 158, 162).

The Comco fined SIX Group with 7 million Swiss francs for refusing to supply interface information to other competitors and therefore rendering their product incompatible with SIX terminals (RPW/DPC 2011/1, p. 96, *SIX/ Terminals mit Dynamic Currency Conversion* (*DCC*)).

In a recent decision, the Comco fined Swisscom with about 72 million francs for refusing to supply some competitors with broadcasts of live sports for their platforms entirely and for having only granted limited access to a reduced range of sports content to others (Comco, 9 May 2016, *Sport on Pay-TV*). Swisscom decided to challenge this decision of the Comco before the Federal Administrative Court.

Civil courts are likely to find a refusal to deal abuse more easily. In a judgment of 23 May 2013, the Federal Supreme Court confirmed that a company managing a cheese-maturing cellar with regard to the production of an AOC cheese (ie, a cheese with a protected designation of origin label) had abused its dominant position by preventing the plaintiff, a cheese manufacturer, from being admitted to the cheese-maturing cellar (Federal Supreme Court, 23 May 2013, 139 II 316, *Etivaz*). In addition to ordering access to the maturing cellar, the Federal Supreme Court upheld a duty to accept the plaintiff as a member of a cooperative society managing the cheese-maturing cellar.

The essential facility doctrine is partly recognised in practice, in that it justifies the finding of a dominant position and the duty to deal. However, the existing case law does not specify under which conditions such access must be granted and a refusal to deal may be considered as abusive without fulfilling the traditional conditions of the essential facility doctrine.

20 Predatory product design or a failure to disclose new technology

Such practices may be covered by the general clause of article 7 paragraph 1 of the Cartel Act.

21 Price discrimination

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade, in particular also through specific rebate and pricing schemes, by a dominant undertaking is unlawful (see also question 14).

22 Exploitative prices or terms of supply

The imposition of unfair prices or other unfair conditions of trade may be considered as unlawful (article 7, paragraph 2(c) of the Cartel Act). Unfair prices are, in general, considered an exploitative practice and, therefore, as an abuse of dominance. In principle, the 'unfair' criterion of a price is to be construed in relation to the market value of the services offered and to the ability of the dominant undertaking to behave independently in the price setting; customers should lack alternative solutions, and hence the ability of the dominant company to exert a certain coercion on the customers (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*).

The Comco imposed a record fine of 333 million francs on Swisscom, the incumbent Swiss telecom provider, for imposing unfair prices in the mobile call termination market (RPW/DPC 2007/2, p. 241, *Terminierungspreise im Mobilfunk*). The decision was quashed by the Federal Administrative Court in February 2010 (RPW/DPC 2010/2, p. 242). The annulment was confirmed by the Federal Supreme Court in April 2011, which held that, owing to the regulatory framework pertaining to telecommunications, Swisscom could not exert coercion against the counterparties, and if this were the case, the other counterparties (ie, competitors) could have complained to the Swiss Federal Communications Commission ComCom (RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). On the basis of the above-mentioned judgment of the Federal Supreme Court, the Comco decided to close the investigation it had opened on 15 October 2002 against the three competing mobile network operators Swisscom, Sunrise and Orange for an abuse of a (collective) dominant position (RPW/DPC 2011/4, p. 522, *Terminierungspreise im Mobilfunk*).

In the *Swisscom WAN* case, the Comco also fined Swisscom for imposing unfair prices with regard to its WAN connection wholesale offerings for competitors (RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung*).

23 Abuse of administrative or government process

Such practices may be covered by the general clause of article 7 paragraph 1 the Cartel Act.

24 Mergers and acquisitions as exclusionary practices

The Cartel Act does not deal with structural abuses specifically. Article 7 paragraph 2 of the Cartel Act sets forth merely examples, and its general clause in paragraph 1 covers structural abuses if the conduct of dominant undertakings enables them to exclude rivals or exploit customers or consumers. As mentioned above, the Cartel Act contains specific provisions on merger control, and, therefore, mergers that exceed the specific turnover thresholds are subject to ex ante control. However, notwithstanding these thresholds, a merger control notification is mandatory if one of the undertakings concerned has been held to be dominant in a market Switzerland in a final and binding decision under the Cartel Act, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof (article 9 paragraph 4 of the Cartel Act; see, in particular, decision of the Federal Administrative Court, 29 April 2014, B-6180/2013, The Swatch Group AG).

The concept of structural abuse is relevant in particular with regard to the acquisition of minority shareholdings and to mergers of a dominant undertaking not reaching the thresholds or not being held dominant respectively for ex ante notification.

The Comco has investigated or discussed the acquisition of a minority shareholding in a few cases. In *Minderheitsbeteiligungen der Publigroupe SA (und ihrer Tochtergesellschaften) an Zeitungsverlagen* (RPW/DPC 2006/3, p. 449), the Comco confirmed the application of article 7 of the Cartel Act to structural abuses, in particular to the acquisition of minority shareholding by a dominant undertaking. It defines structural abuse as the 'use by a dominant undertaking of the modification of the market structure to its advantage'. However, the acquisition of minority shareholdings should become a systematic strategy to be considered as an abuse.

25 Other abuses

Other possible abuses of dominant undertakings, eg, strategic capacity construction, underinvestment in capacity, predatory advertising or excessive product differentiation must be assessed on a case by case basis, may be covered by the umbrella clause of article 7 paragraph 1 of the Cartel Act and thus, according to the recent case law of the Federal Administrative Court, also be sanctioned (RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*).

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Comco takes decisions, remedial actions and sanctions against undertakings abusing their dominant positions.

Its Secretariat is empowered to conduct investigations and, together with a member of the Comco, to issue any necessary procedural ruling. The Secretariat submits draft decisions to the Comco and implements the latter's decisions.

The Secretariat has broad investigative powers, in particular, it may order searches (ie, dawn raids) and seize any evidence, or hear third parties as witnesses, and require the parties to an investigation to give evidence. Upon specific request for information, the undertakings under investigation are obliged to provide the competition authorities with all the information required for their investigations and produce the necessary documents, however in due consideration of the nemo tenetur principle, ie the right against self-incrimination (see Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, P. 561, *Preispolitik Swisscom ADSL*).

The Secretariat published a note on selected instruments of investigation in January 2016. Therein, it laid out its best practice particularly with regard to inspections and the seizure of documents and electronic data.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

A dominant company condemned for unlawful (abusive) conduct risks fines up to 10 per cent of the turnover that it cumulatively achieved in Switzerland in the preceding three financial years. The amount of the fine is dependent on the duration and severity of the unlawful behaviour, and is calculated also by taking into account the likely profit that resulted from the unlawful behaviour. The Cartel Act Sanctions Ordinance (CASO) lays down the method of calculation of the fines in detail.

The largest fine ever issued for abuse of a dominant position, 333 million francs, was cancelled by the Federal Administrative Court and, subsequently, also by the Federal Supreme Court (RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*; see, question 22). Swisscom received another fine of 220 million francs in 2009 for an unlawful price squeeze in the ADSL market (RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom ADSL*). The Federal Administrative Court, however, reduced the fine to about 186 million francs (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*). With decision of 21 September 2015, Comco imposed a fine on Swisscom in the *WAN-Anbindung* case of about 7.9 million francs ((RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung)* and with decision of 9 May 2016, Comco imposed a fine of about 72 million francs on Swisscom with regard to an abusive conduct against competing TV platform operators in the live sports broadcasting markets (Comco, 9 May 2016, *Sport on Pay-TV*).

The fine on Publigroupe of 2.5 million francs for refusal to deal and discriminatory practices was confirmed by the Federal Administrative Court in April 2010 (*RPW/DPC)* 2010/2, p. 329) and by the Federal Supreme Court on 29 June 2012 (*RPW/DPC* 2013/1, p. 114).

In the *Publigroupe* case, the Federal Administrative Court, referring to article 7 of the European Convention of Human Rights, distinguished between practices falling within the list of article 7 paragraph 2 of the Cartel Act and those covered by the general clause of article 7 paragraph 1 of the Cartel Act: only the former are liable to be sanctioned with a fine, because the general clause does not offer sufficient legal certainty to undertakings. However, in the recent decision on the *Swisscom ADSL* case, the Federal Administrative Court changed its position and based a fine in the amount of 186 million francs solely on the general clause of article 7 paragraph 1 of the Cartel Act, basically arguing that Swisscom must have known that a price squeeze constitutes an abusive conduct (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, P. 561, *Preispolitik Swisscom ADSL*). It remains to be seen whether the Federal Supreme Court will share this view; the judgment of the Federal Administrative Court is currently under appeal before the Federal Supreme Court.

Besides the possibility to impose fines (indeed, imposing a fine is compulsory in the case of an unlawful abuse of a dominant position), the Comco has a wide range of decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify specific business practices (for instance, to grant access or to modify rebate schemes or discriminatory pricing practices).

As compared to some other jurisdictions, the Cartel Act does not provide for sanctions that may be imposed on individuals acting on behalf of an undertaking which abused its dominant position. Individuals, however, may be fined in a few other cases, particularly in the case of a violation of a binding decision of the Comco (article 54 of the Cartel Act) or if the individual itself qualifies as an undertaking in the sense of the Cartel Act.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Sanctions can be imposed by the Comco autonomously, without having to petition any court. In that regard, the Federal Administrative Court and the Federal Supreme Court come only into play where a sanction decision of the Comco is challenged by the undertaking concerned (see question 33).

Update and trends

On 17 September 2014, the Federal Parliament finally rejected a planned major revision of the Cartel Act. Subsequent to the rejected revision, individual proposals were submitted. One new attempt aims at the adoption of (some of) the non-controversial proposals of the failed revision of the Cartel Act. The other proposals relate to more controversial topics. First, the parliamentary initiative 'Excessive Import Prices. End Compulsory Procurement on the Domestic Market' of 25 September 2014 was filed and admitted. Secondly, the federal popular initiative 'Stop to the Swiss Island of High Prices – Pro Fair Import Prices (Fair-Price Initiative)' was launched. Both legislative attempts aim to introduce new regulation with regard to abuses of undertakings with 'relative market power' (a concept already known in the national German competition law). According to the initiatives, subject to legitimate business reasons, undertakings shall particularly abuse their relative market power if they either refuse to contract with Swiss domestic customers willing to purchase products abroad to the corresponding foreign conditions or charge Swiss prices anyhow. The motion 'For a More Effective Cassis de Dijon Principle' of 18 June 2015 aims to ensure that manufacturers expressly permit in their distribution agreements Swiss domestic distribution partners, inter alia, to carry out installation, maintenance or guarantee work for their products, irrespective of whether these products have been purchased directly in the EEA. The Parliament has approved this motion and it now is for the Economic Affairs and Taxation Committees to draft a proposal for legislative amendments.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

There are usually only a few investigations opened and final decisions rendered each year with regard to abusive conduct of dominant undertakings, if any. The enforcement record is certainly lower compared to opened investigations and rendered decisions with regard to anticompetitive agreements between undertakings. However, notwithstanding these numbers, the largest fines have been imposed on companies that have been held responsible for abusive conduct (see questions 19 and 27).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The contracts entered into by dominant undertakings that constitute an abuse of a dominant position may be declared null and void, in whole or in part, with retroactive effect (ex tunc; see also, article 13 of the Cartel Act and the decision of the Federal Supreme Court, 12 June 2008, 134 III 438). The issue of the nullity remains, however, controversial, and there is no specific case law with regard to contracts concluded by dominant undertakings.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Civil courts are expressly empowered to apply the Cartel Act. In particular, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request before civil courts the elimination of or desistance from the hindrance, damages and satisfaction in accordance with the Code of Obligations, or the surrender of unlawfully earned profits (article 12 of the Cartel Act). Hindrances of competition include, in particular, the refusal to deal and discriminatory measures.

The Cartel Act empowers civil courts (at the plaintiff's request) to rule that any contracts are null and void in whole or in part, or that the person responsible for hindering competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (article 13 of the Cartel Act).

The Federal Supreme Court upheld an order of a lower civil court to a cooperative society managing a cheese maturing cellar to accept a company as a member and to grant, therefore, access to the maturing cellar (Federal Supreme Court, 23 May 2013, 139 II 316, *Etivaz*).

In another case, the Cantonal Court of Vaud ordered a European sport federation to invite an athlete to one of its competitions. A recommendation issued by the sport federation, a Swiss domiciled association, not to invite athletes who could harm the events because of their past doping offences was considered as infringing rules on abuse of a dominant position (article 7 of the Cartel Act) and injuring athletes' personality rights (Cantonal Court of Vaud, 24 June 2011, published in CaS 2011, 282).

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes. See question 31.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Undertakings that receive a decision of Comco holding them responsible for unlawful abusive conduct and, to a limited extent, also Comco's interim procedural decisions, can be challenged before the Federal Administrative Court. An appeal can be lodged on the following grounds: (i) wrongful application of the Cartel Act; (ii) the facts established by the Comco were incomplete or wrong; or (iii) the Comco's decision was unreasonable. Hence, the appeal before the Federal Administrative Court is a 'full merits' appeal on both the findings of fact and law.

The judgments of the Federal Administrative Court may be challenged before the Federal Supreme Court. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims, ie the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, or in the European Convention of Human Rights or other international treaties. The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

The judgments of upper cantonal civil courts rendered in civil actions may also be ultimately challenged before the Federal Supreme Court.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

The Cartel Act does not set forth specific rules which apply to the unilateral conduct of non-dominant firms. However, under specific circumstances, the Cartel Act may nevertheless be applicable to such undertakings, as the concept of dominance has already been applied to cases of vertical economically dependent relationships (see question 2). Moreover, such rules are also contained in the Unfair Competition Act (see question 6). Finally, some new proposals that aim at restricting certain conduct by non-dominant firms are currently being debated (see Update and trends).

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The main legislation applying specifically to the behaviour of dominant firms is article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that 'any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited.' Article 6 of Law No. 4054 does not define what constitutes 'abuse' per se but it provides a non-exhaustive list of specific forms of abuse, which is, to some extent, similar to article 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly article 82 of the EC Treaty). Accordingly, such abuse may, in particular, consist of:

(a) directly or indirectly preventing entries into the market or hindering competitor activity in the market;
(b) directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;
(c) making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as the purchase of other goods and services or; acceptance by the intermediary purchasers of displaying other goods and services or maintenance of a minimum resale price;
(d) distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market;
(e) limiting production, markets or technical development to the prejudice of consumers.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 3 of Law No. 4054 defines dominance as 'the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution, independently from competitors and customers'. Enforcement trends show that the Turkish Competition Board (Board) is increasingly inclined to somewhat broaden the scope of application of the article 6 prohibition by diluting the 'independence from competitors and customers' element of the definition to infer dominance even in cases of dependence or interdependence (see, for example, *Anadolu Cam* (1 December 2004, 04-76/1086-271) and *Warner Bros* (24 March 2005, 05-18/224-66).

The Board considers a high market share as the most indicative factor of dominance. Nevertheless, it also takes account of other factors (such as legal or economic barriers to entry, portfolio power and financial power of the incumbent firm) in assessing and inferring dominance.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

Influenced by the Turkish Competition Authority's publication in 2001 of The Prime Objective of Turkish Competition Law Enforcement from a Law & Economics Perspective (Gönenç Gürkaynak), the economic rationale is more typically described in Turkish competition law circles as 'the ultimate object of maximising total welfare by targeting economic efficiency'. Regulations that were enacted in previous years, albeit not directly applicable to dominance cases, place greater emphasis on 'consumer welfare' (see Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board). Nevertheless, since the legislative history and written justification of Law No. 4054 contain clear references to non-economic interests as well (such as the protection of small and medium-sized businesses, etc), some of these policy interests are still pursued in Turkey, especially in dominance cases, alongside the economic object.

It would only be fair to observe that the Board has been successful in blending economic and non-economic interests, and preventing one from overriding the other in its precedents.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Law No. 4054 does not recognise any industry-specific abuses or defences. However, certain sectorial regulators have concurrent powers to diagnose and control dominance in their relevant sectors. For instance, the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority prohibits 'firms with significant market power' from engaging in discriminatory behaviour between companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility-sharing. These firms are also required to make an 'account separation' for costs they incur regarding their networks such as energy air conditioning and other bills. Similar restrictions and requirements also exist for energy companies.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

Dominance provisions (and other provisions of Law No. 4054) apply to all companies and individuals, to the extent that they act as an 'undertaking' within the meaning of Law No. 4054. An 'undertaking' is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054, therefore, applies to individuals and corporations alike, if they act as an undertaking. State-owned entities also fall within the scope of the application of article 6. While the Board placed too much emphasis on the 'capable of acting independently' aspect of this definition to exclude state-owned entities from the application of Law No. 4054 at the very early stages of the Turkish competition law enforcement (see, for example, *Sugar Factories* (13 August 1998, 78/603-113),

the recent enforcement made it clear that the Board now uses a much broader and more accurate view of the definition, in a manner that also covers public entities and sport federations (see, for example, *Turkish Coal Enterprise* (19 October 2004, 04-66/949- 227); *Turkish Underwater Sports Federation* (3 February 2011, 11-07/126- 38); *Türk Telekom* (24 September 2014, 14-35/697-309) and *Devlet Hava Meydanları İşletmesi* (9 September 2015, 15-36/559-182). Therefore, state-owned entities are also subject to the Competition Authority's enforcement, pursuant to the prohibition laid down in article 6.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The article 6 prohibition applies only to dominant undertakings. In similar fashion to article 102 of the TFEU, dominance itself is not prohibited, only the abuse of dominance is.

Structural changes through which a non-dominant firm attempts to become dominant (for example, by acquisition of other businesses) are regulated by the merger control rules in article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance is not sufficient for enforcement even under the Turkish merger control rules, and a 'restriction of effective competition' element is required. As for the dominance enforcement rules, 'attempted monopolisation or dominance' is not recognised under the Turkish competition legislation.

7 Collective dominance

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

Collective dominance is covered by the Turkish competition legislation. The wording 'any abuse on the part of one or more undertakings' of article 6 clearly prohibits abuses of collective dominance. Turkish competition law precedents on collective dominance are neither abundant nor sufficiently mature to allow for a clear inference of a set of minimum conditions under which collective dominance would be alleged. That said, the Board has considered it necessary to establish 'an economic link' for a finding of abuse of collective dominance (see, for example, *Biryay* (17 July 2000, 00-26/292-162) and *Turkcell/Telsim* (9 June 2003, 03-40/432-186).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

While the law does not contain a specific reference to dominant purchasers, or a monopsony market, dominant purchasers may also be covered by the legislation, if and to the extent that their conduct amounts to an abuse of their dominant position.

The enforcement track record indicates that no article 6 cases involved a finding of infringement and imposition of monetary fines on dominant purchasers. However, the Board did not decline jurisdiction over claims of abuse by dominant purchasers in the past (see, for example, *ÇEAS* (10 November 2003, 03-72/874-373). Agreements to exert exploitative purchasing power between non-dominant firms have also been condemned under article 4 (*Cherry Exporters*, 24 July 2007, 07-60/713-245).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The test for market definition does not differ from the concept used for merger control purposes. The Board issued the Guidelines on the Definition of the Relevant Market (Guidelines) on 10 January 2008, with the goal of stating, as clearly as possible, the method used for defining a market and the criteria followed for taking a decision by the Board, in order to minimise the uncertainties undertakings may face. The Guidelines are closely modelled on the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (97/C 372/03). The Guidelines apply to both merger control and dominance cases. The Guidelines consider demand-side substitutability as the primary standpoint of market definition. They also consider supply-side substitutability and potential competition as secondary factors.

Although not directly applicable to dominance cases, the Guidelines on Horizontal Mergers confirm that companies with market shares in excess of 50 per cent may be presumed to be dominant. The Competition Authority's Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (Guidelines on Exclusionary Abuses), published on 29 January 2014, and the Board's past and recent precedents, make it clear that an undertaking with a market share lower than 40 per cent is unlikely to be in a dominant position (paragraph 12 of the Guidelines on Exclusionary Abuses and the Board's decisions such as *Mediamarkt* (12 May 2010, 10-36/575-205); *Pepsi Cola* (5 August 2010, 10-52/956-335) and *Egetek* (30 September 2010, 10-62/1286-487). That said, the Board's decisions and Guidelines on Exclusionary Abuses are clear that market shares are the primary indicator to the dominant position, but not the only one. The barriers to entry, the market structure, the competitors' market positions and other market dynamics, as the case may be, should also be considered. The undertakings may refute the assumption through demonstrating that they do not have market power to act independently of market parameters. Economic or market studies are important in this regard.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Law No. 4054 is silent on the definition of abuse. It only contains a non-exhaustive list of specific forms of abuse. Moreover, article 2 of Law No. 4054 adopts an effects-based approach to identifying anti-competitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of conduct.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices. It also covers discriminatory practices.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Theoretically, a causal link must be shown between dominance and abuse. However, the Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was also employed in demonstrating the existence of dominance.

Article 6 also prohibits abusive conduct on a market different to the market subject to dominant position. Accordingly, the Board found incumbent undertakings to have infringed article 6 by engaging in abusive conduct in markets neighbouring the dominated market (see, for example, *Volkan Metro* (2 December 2013, 13-67/928-390), *Türkiye Denizcilik İşletmeleri* (24 June 2010, 10-45/801-264), *Türk Telekom* (2 October 2002, 02-60/755-305) and *Turkcell* (20 July 2001, 01-35/347-95).

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

The chances of success of certain defences and what constitutes a defence depend heavily on the circumstances of each case. It is also possible to invoke efficiency gains, as long as it can be adequately

demonstrated that the pro-competitive benefits outweigh the anticompetitive impact.

Specific forms of abuse

14 Rebate schemes

While article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute an abuse. In *Turkcell* (23 December 2009, 09-60/1490-379), the Board condemned the defendant for abusing its dominance by, among other things, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that cooperate with competitors. The Board adopted a similar approach concerning the rebate schemes used by Doğan Media Group and fined the defendant for abusing its dominance through, inter alia, rebate schemes (30 March 2011, 11-18/341-103).

15 Tying and bundling

Tying and bundling are among the specific forms of abuse listed in article 6. The Board assessed many tying, bundling and leveraging allegations against dominant undertakings. However, so far, there have been no cases where the incumbent firms were fined based on tying or leveraging allegations. However, the Board ordered some behavioural remedies against incumbent telephone and internet operators in some cases, in order to have them avoid tying and leveraging (*TTNET-ADSL*, 18 February 2009, 09-07/127-38).

16 Exclusive dealing

Although exclusive dealing normally falls under the scope of article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be scrutinised within the scope of article 6. Indeed, the Competition Board has already found in the past infringements of article 6 on the basis of exclusive dealing arrangements (eg, *Karboğaz*, 1 December 2005; 05-80/1106-317). Similarly, the Board imposed a fine on Mey İçki (the allegedly dominant undertaking in the market for the alcoholic beverage rakı), for its abusive conduct through which it prevented sales points from selling Mey İçki's competitors' products through exclusivity clauses and therefore foreclosed the market (*Mey İçki,* 12 June 2014, 14-21/470-178).

17 Predatory pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board (see, for example, *TTNet* (July 11, 2007, 07-59/676-235); D*enizcilik İşletmeleri* (12 October 2006, 06-74/959-278); Coca-Cola (23 January 2004, 04-07/75-18); *Türk Telekom/ TTNet* (19 November 2008, 08-65/1055-411); *Trakya Cam* (17 November 2011, 11-57/1477-533), *Tüpraş* (17 January 2014, 14-03/60-24), *THY* (30 December 2011, 11-65/1692-599) and *UN Ro-Ro* (1 October 2012, 12-47/1413-474). That said, complaints on this basis are frequently dismissed by the Competition Authority owing to its welcome reluctance to micro-manage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims.

In predatory price analysis, the Board primarily evaluates whether there is an anticompetitive foreclosure for the competitors. Neither the Guidelines nor the precedents of the Board deem recoupment a necessary element. The Board has decided that predatory pricing may be established based on the following four criteria (*Kale Kilit*, 6 December 2012, 12-62/1633-598):

- financial superiority of the undertaking;
- unusually low price;
- intention to impair competitors; and
- losses borne in a short term in exchange for long-term profits.

18 Price or margin squeezes

Price squeezes may amount to a form of abuse in Turkey and recent precedents have resulted in the imposition of fines on the basis of price squeezing. The Board is known to closely scrutinise allegations of price squeezing. (See *Türk Telekom*, 19 October 2004, 04-66/956-232); *TTNet* (11 July 2007, 07-59/676-235); *Dogan Dağıtım* (9 October 2007, 07-78/962-364); and *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411.)

19 Refusals to deal and denied access to essential facilities

Refusals to deal and access to essential facilities are common forms of abuse, and the Competition Authority is very familiar with this type of abuse (see, for example, *Eti Holding* (21 December 2000, 00-50/533-295); *POAS* (20 November 2001, 01-56/554-130); *Ak-Kim* (4 December 2003, 03-76/925-389); and *Çukurova Elektrik* (10 November 2003, 03-72/874-373).

20 Predatory product design or a failure to disclose new technology

The list of specific abuses contained in article 6 is not exhaustive and other types of conduct may be deemed abusive. However, the enforcement track record shows that the Board has not been in a position to hand down an administrative fine on any allegations of other forms of abuse such as strategic capacity construction, predatory product design or process innovation, failure to disclose new technology, predatory advertising or excessive product differentiation.

21 Price discrimination

Price and non-price discrimination may amount to an abusive conduct under article 6. The Board has found incumbent undertakings to have infringed article 6 in the past by engaging in discriminatory behaviour concerning prices and other trade conditions (see, for example, *TTAS* (2 October 2002, 02-60/755-305) and *Türk Telekom/TTNet* (19 November 2008, 08-65/1055-411). There is no other law that specifically regulates the price discrimination.

22 Exploitative prices or terms of supply

Exploitative prices or terms of supply may be deemed to be an infringement of article 6, although the wording of the law does not contain a specific reference to this concept. The Board condemned excessive or exploitative pricing by dominant firms in the past (eg, *Tüpraş*, 14-03/60-24, 17 January 2014; *TTAŞ*, 2 October 2002, 02-60/755-305, and *Belko*, 9 April 2001, 01-17/150-39). However, complaints filed on this basis are frequently dismissed because of the Competition Authority's reluctance to micro-manage pricing behaviour.

23 Abuse of administrative or government process

While the precedents of the Board do not yet include a finding of infringement on the basis of abuse of a government process and this issue has not been brought to the Competition Authority's attention yet, there seems to be no reason why such abuses should not lead to a finding of an infringement of article 6, if adequately demonstrated.

24 Mergers and acquisitions as exclusionary practices

Mergers and acquisitions are normally caught by the merger control rules contained in article 7 of Law No. 4054. However, there have been some cases, albeit rare, where the Board found structural abuses through which dominant firms used joint venture arrangements as a back-up tool to exclude competitors. This was condemned as a violation of article 6 (see *Biryay I* (17 July 2000, 00-26/292-162).

25 Other abuses

The list of specific abuses present in article 6 is not exhaustive and it is very likely that other types of conduct may be deemed as abuse of dominance. However, the enforcement track record shows that the Board has not been in a position to review any allegation of other forms of abuse such as strategic capacity construction, predatory product design or process innovation, failure to predisclose new technology, predatory advertising or excessive product differentiation.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The national competition authority for enforcing competition law in Turkey is the Competition Authority, a legal entity with administrative and financial autonomy. As the competent body of the Competition

Update and trends

No significant change is expected to the legislation or other measures that will have an impact on the area of abuse of dominance in the near future. However, it is fair to say that competition law enforcement is expected to focus more on platform business models in multi-sided markets. For instance, the Competition Board analysed the exclusionary effects of the most favoured customer clauses in a platform business model, and condemned these clauses for the first time (*Yemeksepeti*, 9 June 2016, 16-20/347-156 – abuse of a dominant position by enforcing the most favoured nation clauses on a multisided market).

Authority, the Competition Board is responsible for, inter alia, investigating and condemning abuses of dominance.

The Competition Board has relatively broad investigative powers. It may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information or failure to produce on a timely manner may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed. Theis administrative monetary fine may not be lower than 18,377 lira for 2017.

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can examine the records, paperwork and documents of undertakings and trade associations and, if need be, take copies of the same; request undertakings and trade associations to provide written or verbal explanations on specific topics; and conduct on-site investigations with regard to any asset of an undertaking.

Law No. 4054 therefore grants the Competition Authority vast authority to conduct dawn raids. A judicial authorisation is obtained by the Competition Board only if the undertaking concerned refuses to allow the dawn raid. While the mere wording of the law allows oral testimony to be compelled of employees, case-handlers do allow delaying an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided a written response is submitted in a mutually agreed timeline. Computer records are fully examined by the experts of the Competition Authority, including deleted items. Refusing to grant the staff of the Competition Authority access to business premises may lead to the imposition of fines.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In case of a proven abuse of dominance, the incumbent undertakings concerned shall be (each separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. In this respect, Law No. 4054 makes reference to article 17 of the Law No. 5326 on Minor Offences and there is also a Regulation on Fines (Regulation No 27142 of 16 February 2009). Accordingly, when calculating fines, the Competition Board takes into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, duration and recurrence of the infringement, cooperation or driving role of the undertakings in the infringement, financial power of the undertakings, compliance with the commitments and so on, in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the abusive conduct, to remove all de facto and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the level of competition and status as before the infringement.

Additionally, article 56 of Law No. 4054 provides that agreements and decisions of trade associations that infringe article 4 are invalid and unenforceable with all their consequences. The issue of whether the 'null and void' status applicable to agreements that fall foul of article 4 may be interpreted to cover contracts entered into by infringing dominant companies is a matter of ongoing controversy. However, contracts that give way to or serve as a vehicle for an abusive conduct may be deemed invalid and unenforceable because of violation of article 6.

The highest fine imposed to date in relation to abuse of a dominant position is in the *Tüpraş* case where Tüpraş, a Turkish energy company, incurred an administrative monetary fine of 412 million lira, equal to 1 per cent of its annual turnover for the relevant year (17 January 2014, *Tüpraş*, 4-03/60-24).

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The Competition Board is entitled to impose sanctions directly. Article 27 of the Law No. 4054 deems taking necessary measures for terminating infringements and imposing administrative fines within the duties and powers of the Board. A preliminary approval or consent of a court or another authority is not required.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The recent enforcement trend of the Competition Authority showed that the Authority is becoming more and more interested in the refusals to supply/contract of dominant undertakings. There have been several pre-investigations and investigations launched by the Competition Authority in relation to this aspect of the competition law principles in Turkey over the past year. These instances include *Ankara Uluslararası Kongre ve Fuar İşletmeciliği* (27 October 2016, 16-35/604-269) and Türk Telekomünikasyon (9 June 2016, 16-20/326-146). Other high-profile cases involving abuse of dominance allegations in the past year are *Yemeksepeti* (9 June 2016, 16-20/347-156) and *Türk Eczacıları Birliği* (9 December 2016, 16-42/699-313). In *Yemeksepeti* (an online meal order platform), the Board concluded that the use of most favoured customer clauses violated article 6 of the Law No. 4054 since these clauses gave rise to exclusionary effects in the relevant market. In *Türk Eczacıları Birliği*, the Board decided that the agreements executed with the pharmaceutical suppliers which contain exclusivity clauses violated article 6 of the Law No. 4054.

The length of abuse of dominance proceedings depends on the specific dynamics of each case and the workload that the Competition Board has. However, it is fair to say that the average length of these proceedings from initial investigation to final decision is between one and one-and-a-half years.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

Article 56 of the Law No. 4054 ordains that any agreements and decisions of associations of undertakings, contrary to article 4 of the Law No. 4054, are invalid and unenforceable with all their consequences. The agreement stands if the clause that is inconsistent with the legislation may be severed from the contract according to severability principles.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is available to the extent of seeking damages. However, Law 4054 does not envisage a way for private lawsuits to enforce certain behavioural and other remedies. Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies in case of violation of article 6 of Law No. 4054. Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead it to initiate an investigation, which may or may not result in the finding of an infringement. The legislation does not explicitly empower the Competition Board to demand performance of a specific obligation such as granting access, supplying goods or services or concluding a contract through a court order.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

A dominance matter is primarily adjudicated by the Competition Board. The Competition Board does not decide whether the victims of the abusive practices merit damages. These aspects are supplemented with private lawsuits. Articles 57 et seq of Law No. 4054 entitle any person who is injured in his or her business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and attorney fees. Therefore, Turkey is one of the exceptional jurisdictions where a triple-damages principle exists in the law. In private suits, the incumbent firms are adjudicated before regular civil courts. Because the triple-damages principle allows litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the article 6 enforcement arena. Most of the civil courts wait for the decision of the Competition Board in order to build their own decision on the Competition Board's decision. The decision of the Competition Board is not binding on the court. However, the existence of a Competition Board decision becomes relevant in a number of aspects of civil litigation. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board according to Law No. 2577. Decisions of the Competition Board are considered to be administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Closely modelled on article 102 of the TFEU, article 6 of Law No. 4054 is theoretically designed to apply to the unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in article 6. That said, the indications in practice show that the Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of article 4 of Law No. 4054, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer and that this allows article 4 enforcement against a 'discriminatory practice of even a non-dominant undertaking' or 'refusal to deal of even a non-dominant undertaking' under article 4, the Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm. Owing to this new and rather peculiar concept (that is, article 4 enforcement becoming a fallback to article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to article 6 (dominance provisions) enforcement, (ie, if the engaging entity were dominant) has been reviewed and enforced against under article 4 (restrictive agreement rules).

Recently, this has begun to allow a breach of article 6 (dominance) by article 4 (restrictive agreements) behaviour. There are several decisions where the Board warned non-dominant entities to refrain from imposing dissimilar trade conditions to its distributors or did not allow a non-dominant entity to unilaterally adopt a supply regime whereby counterparts would be required to meet minimum objective criteria. Such decisions are all alarming signs of this new trend. The Board's *3M Turkey* and *Turkcell* decisions are the latest examples of the same trend. In *3M Turkey,* the Board analysed whether 3M Turkey, which was not found to be in a dominant position in the work safety products market, discriminated against some of its dealers under article 4 (restrictive agreements) and not under article 6 (dominance) (9 June 2016, 16-20/340-155). 3M Turkey was handed a fine of 0.5 per cent of its turnover. In *Turkcell*, the Board assessed whether Turkcell's (Turkey's dominant GSM operator) exclusive contracts foreclosed the market, based on both article 6 and article 4 (13 August 2014, 14-28/585-253). The Board found that Turkcell did not violate either article 6 or article 4. The court did not engage in a review of the nuances between article 4 and 6.

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Section 18 of the Competition Act 1998 states that '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 II Prohibition).

As long as the United Kingdom remains a member state of the European Union, the provisions of article 102 of the Treaty on the Functioning of the European Union (TFEU) also apply. UK competition authorities and courts are required to interpret the provisions of section 18 of the Competition Act 1998 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 II prohibition there is no need to show a cross-border effect, and there is 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 geographic markets.

The Competition and Markets Authority (CMA) and sectoral regulators have regard to the European Commission guidance on its enforcement priorities in article 102 cases. In addition, the CMA has published its own guidance papers, including 'Abuse of a dominant position' (OFT 402), 'Assessment of market power' (OFT 415) and 'Market definition' (OFT 403).

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

A series of EU precedents define dominance as the power of an undertaking to behave to an appreciable extent independently of competitors, customers and ultimately consumers. This is consistent with the CMA's approach.

As a first step in the analysis, the CMA assesses the relevant product and geographic market (see question 9). It then considers whether the undertaking has 'substantial market power', taking into account 'market shares, entry conditions, and the degree of buyer power from the undertaking's customers'. If the undertaking 'does not face sufficiently strong competitive pressure' in the relevant market, it may be treated as dominant. In other words, according to CMA guidance, 'market power can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels' (OFT 415, paragraph 3.1).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The standard is strictly economic. Non-competitive factors are not considered.

As explained in response to question 5, there are exemptions from abuse of dominance rules on non-economic grounds (eg, for reasons of public policy or international obligations).

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Although sector-specific rules exist, they do not change the assessment of market power under article 102 TFEU or the Chapter II Prohibition.

Sectoral regulators with concurrent competition powers (see question 26) are generally required to pursue the objective of promoting competition within the sectors they regulate and must 'consider whether the use of their CA98 powers is more appropriate before using their sectoral powers' to achieve this objective (CMA Guidance CMA10, paragraph 4.1). This requirement is intended to strengthen the primacy of competition law.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The rules on abuse of dominance apply to 'undertakings'. This is interpreted widely, encompassing every entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed, in line with EU law. Therefore, if public bodies carry on an economic activity, they are subject to the abuse of dominance rules.

Exemptions from the Chapter II Prohibition exist for: (i) undertakings that have been entrusted with carrying out 'services of general economic interest' (to the extent that the Chapter II Prohibition would prevent them from carrying out those services); (ii) mergers that are subject to EU or UK merger control rules; (iii) conduct that is carried out to comply with a legal requirement; and (iv) conduct that the Secretary of State specifies as being excluded from the Chapter II Prohibition in order to avoid a conflict with the UK's international obligations or for reasons of public policy.

In practice, the Secretary of State has only rarely exercised the power to exclude conduct from abuse of dominance rules. In 2007 the Secretary of State issued an exemption on security grounds relating to complex weaponry. This exemption was revoked in 2011.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Article 102 TFEU and the Chapter II Prohibition apply only to dominant firms.

7 Collective dominance

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

CMA guidance states that two companies can have 'collective dominance' if they 'are linked in such a way that they adopt a common policy on the market', following EU case law (eg, *Compagnie Maritime Belge*) (OFT 415, paragraphs 2.13 to 2.15). These links do not need to be structural.

An abuse of collective dominance may occur where a number of firms that together hold a dominant position take part in a tacitly agreed collective exclusionary or exploitative strategy. Cases involving collective dominance are rare, though, and no UK abuse of dominance cases have found the existence of 'collective dominance'.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The Chapter II Prohibition applies to dominant purchasers as well as dominant suppliers. In *BetterCare Group* (2003) the OFT considered whether a potentially dominant purchaser of residential and nursing home care places – the North & West Belfast Health & Social Services Trust – had committed an abuse by offering excessively low prices and discriminating against private suppliers of residential care homes. The OFT found that 'in exceptional circumstances' (eg, where there are barriers to suppliers exiting the market) it could be abusive to pay excessively low prices. On the facts, the OFT found no evidence of abuse.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The approach to market definition is generally the same in abuse of dominance cases and merger investigations. It is consistent with the approach in EU law.

The relevant 'product market' includes the products and services that are regarded as 'interchangeable' or 'substitutable' by the customer (CAT judgment, *National Grid*, paragraph 34). To identify these substitute products, the CMA applies the 'hypothetical monopolist' test: It asks whether a hypothetical monopolist could profitably sustain a price that is a 'small but significant' amount (usually 5 to 10 per cent) above competitive price levels over a range of goods. If not, the market definition is widened to include the products that customers would switch to in response to a price increase. The same approach is used to identify the relevant 'geographic market', taking into account factors such as shipping costs and the mobility of customers.

Within the relevant market, the CMA applies the (rebuttable) presumption from EU cases that an undertaking is dominant if it 'has a market share persistently above 50 per cent'. High market shares are not determinative, though. The UK Competition Appeal Tribunal (CAT) declined to presume dominance where the defendant had a market share of 89 per cent, following the loss of the defendant's statutory monopoly (National Grid).

CMA guidance also states that it is unlikely that an undertaking could be dominant if it has a market share below 40 per cent (OFT 402, paragraph 4.18). The Office of Communications (Ofcom)'s abuse of dominance investigation into BT in 2008 (*NCNN 500*) in exceptional circumstances found that BT was dominant with a market share of below 31 per cent.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Holding or acquiring a dominant position is not unlawful under UK competition law. A dominant company only infringes the Chapter II Prohibition or article 102 TFEU if it 'abuses' its dominance to restrict competition. 'Abuses' fall into two main categories – conduct that 'exploits' consumers directly (eg, charging excessive prices) and conduct that 'excludes' competitors from the market.

Certain types of conduct are categorised as 'by nature' infringements. Unless they are objectively justified, these forms of conduct are treated as infringing the Chapter II Prohibition without needing to show any anticompetitive effect, albeit an analysis of the relevant circumstances may be required. The category of 'by nature' abuses is narrow, and CMA guidance confirms that the 'likely effect' of a dominant undertaking's conduct is generally more important than its 'specific form' (OFT 402, paragraph 5.2).

For other types of conduct, case law establishes a need to show that anticompetitive effects are reasonably likely and the High Court has held that actual effects on the market is 'a very relevant consideration' (*Streetmap v Google*). Moreover, the assessment of whether conduct is abusive should be looked at 'in the round', rather than seeking to identify on a narrow basis whether conduct is different from 'normal competition' (*National Grid*, Court of Appeal judgment, paragraphs 40–41).

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

As a general matter, the Chapter II Prohibition does require some link between an undertaking's dominant position and its abusive behaviour.

In *Flybe* the OFT considered a theory of harm whereby Flybe was alleged to have entered a new route – on which it was not dominant – to strengthen its position on a separate market where it was dominant. The OFT stated that conduct on a non-dominated market could be abusive, provided that:

- the conduct took place on 'closely associated markets' and is likely to protect or strengthen the position on the dominated market; or
- the conduct produces effects on the non-dominated market, provided special circumstances exist, in particular 'the existence of sufficiently proximate associative links between the markets in question'.

The OFT noted, however, that the case law on how closely linked the markets must be is not well developed.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

It is a defence for a dominant undertaking to show that its conduct was 'objectively justified', even if it restricted competition (OFT 402, paragraph 5.3). This applies both to 'by nature' abuses and other types of conduct. The dominant undertaking bears the burden of showing an objective justification.

Objective justifications are assessed in line with EU law. In *Streetmap v Google* the High Court observed that 'it is open to the dominant undertaking to show that any exclusionary effect on the market is counter-balanced or outweighed by advantages that also benefit consumers'. These advantages or efficiencies may consist of 'technical improvements in the quality of the goods', not just 'economic considerations in terms of price or cost'.

The undertaking must also show that the conduct is 'proportionate' to achieving its objective. In other words, the conduct must be 'indispensable and proportionate' to the goal pursued, such that there are 'no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies' (*Streetmap v Google*).

See also the exemptions from abuse of dominance rules (see question 5).

Specific forms of abuse

14 Rebate schemes

In line with EU law, rebates are generally categorised into three groups:

- Quantity discounts linked solely to the volume of purchases from the manufacturer are treated as presumptively lawful.
- 'Exclusivity' rebates have been treated as 'by nature' anticompetitive in several EU cases. This may change depending on whether the Court of Justice follows Advocate General Wahl's opinion in *Intel*, in which he advised that exclusivity rebates 'should not be regarded as a separate and unique category of rebates' that are unlawful regardless of the context, but instead require an assessment of all the circumstances.
- 'Loyalty inducing' rebates require an assessment of all the circumstances to analyse whether they make market entry more difficult and impede purchasers' ability to choose their sources of supply (eg, whether the rebates are retroactive or incremental; whether they are individualised or standardised; the length of the reference period) (*Post Danmark II*).

In July 2015 the CMA closed a case concerning rebates in the 'loyalty inducing' category in the pharmaceutical sector, sending a warning letter to the company concerned (Case CE/9855-14). The CMA made the following observations that offer general guidance on its position on potentially loyalty inducing rebates:

- Retroactive rebates may exclude rivals from competing for 'contestable' orders if the discount is applied also to the 'non-contestable' share of orders that the customer wants or needs to place with the dominant firm.
- A retroactive rebate may result in a competitor having to offer a price below the dominant company's costs of production in order to compete for the contestable share, thereby excluding an 'equally efficient competitor'.
- Exclusionary concerns are exacerbated if the customer is able to 'reduce its overall expenditure on the dominant company's products by increasing the volume of contestable sales it purchases from the dominant company' (ie, where the dominant undertaking charges 'negative incremental prices'). This is the 'suction effect' of loyalty-inducing rebates.

15 Tying and bundling

Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product'.

Section 18(2)(d) of the Competition Act 1998 states that an abuse of dominance may consist of 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts'.

The elements of anticompetitive tying are the following:

- the tying and tied goods are separate products;
- the undertaking is dominant in the tying product market;
- customers have no choice but to obtain the tied and tying products together;
- the tying conduct forecloses competition; and
- there is no objective justification for the tie.

In *Genzyme* the Office of Fair Trading (OFT), the CMA's predecessor, alleged that the company had abused its dominance by offering its drug for treating Gaucher's disease together with its homecare services, under a single price. The CAT agreed that the drug and homecare services were distinct products that Genzyme was offering as a package for a single price. In principle, therefore, the drug and homecare products were tied together.

However, the CAT held that there was no abuse, since the OFT failed to show that the conduct would 'eliminate or substantially weaken competition'. There was no evidence that the NHS had wanted to obtain homecare services from a third party – it had not asked Genzyme to lower its drug prices to exclude the cost of homecare – and it was unclear that there was a way for Genzyme to unbundle the two products, given that no NHS body had proposed a separate contract to supply homecare services.

16 Exclusive dealing

Exclusivity arrangements have been treated as restricting competition by their very nature. They therefore do not require proof of restrictive effects (although see response to question 14 concerning the Advocate General's Opinion in *Intel*).

UK competition authorities have challenged exclusivity agreements in a series of cases.

In 2014, the High Court held that Luton Airport's decision to grant National Express the exclusive right to operate a bus service from the airport to various London locations for seven years – combined with a right of first refusal on new routes – was anticompetitive (*Arriva v Luton Airport*).

In *National Grid* the Court of Appeal upheld a finding that contracts for the provision of meter readers that lasted many years – coupled with charges for early termination and a requirement to maintain a given proportion of National Grid's meters at the end of each year – were exclusionary.

In *EWS Coal Haulage Contracts*, the Office of Rail Regulation (ORR) found that EWS had entered into long-term agreements with the owners of power stations, in certain instances to supply all or almost all of their coal rail haulage. These agreements had a long duration – in one instance with a term of 10 years.

The CMA has also resolved cases concerning exclusivity through commitments. In *Epyx* the duration of the agreements was reduced from three to seven years to 18 months and customers were allowed to place test orders with rival services. In *Western Isle Road Fuels* five-year exclusivity agreements were made terminable on three months' notice.

17 Predatory pricing

Predatory pricing arises when a dominant company charges prices below its cost so that even equally efficient competitors cannot viably remain on the market.

A two-stage test applies to classify predatory pricing as abusive: (i) pricing below 'average variable cost' (AVC) or 'average avoidable cost' (AAC) is presumptively abusive; (ii) pricing below average total cost but above AVC or AAC is abusive if it is part of a plan to eliminate a competitor.

This approach has been followed in several UK cases, including findings of infringement in *Cardiff Bus*, involving the launch of a loss-making bus service (OFT decision, paragraphs 7.13 and 7.154 to 7.163); *Aberdeen Journals*, involving the sale of newspaper advertising space below the variable cost of producing the newspaper (CAT judgment, paragraphs 351–358); and *Napp Pharmaceuticals*, where Napp supplied morphine tablets to hospitals below cost in order to protect its position in the 'community segment' where clinicians generally prescribed the same drugs as those selected by hospitals (CAT judgment, paragraphs 207-216).

An important question is the timescale and output over which prices and costs are compared. In *Flybe*, the OFT found no grounds for action, even though Flybe's entry on a new flight route would be loss-making in the first year. A relevant consideration was that Flybe's internal documents indicated that it expected revenue to catch up with AAC in the second year and exceed AAC in the fourth year. Moreover, it was common in the airline industry that new routes would suffer losses initially. Losses in the first year alone was not therefore 'conclusive evidence of sacrifice' (OFT decision, paragraph 6.44).

The CMA and/or sectoral regulators with concurrent antitrust powers, might – depending on the facts of the case – consider alternative cost benchmarks when assessing pricing abuses. For example, in an investigation into certain pricing practices by British Telecom, the UK telecoms regulator, Ofcom, applied a cost measure that it described as 'CCA FAC [current cost account fully allocated costs] or LRIC+ [long run incremental cost plus a mark-up for the recovery of common costs]'. Ofcom explained that it had 'taken as its benchmark for setting the margin, a new entrant today which has the same underlying cost function to BT (ie, similarly efficient) but enters later and benefits from fewer economies of scale and scope' (Direction Setting the Margin between IPStream and ATM interconnection Prices, Ofcom notice, paragraph 2.32).

In line with EU case law (in particular *Tetra Pak II*), it is not necessary to prove that the dominant undertaking had the possibility to recoup its losses in order to find that pricing is predatory (OFT, *Cardiff Bus*, paragraph 7.251).

18 Price or margin squeezes

A margin squeeze occurs when a vertically integrated company sells its own downstream product at a low price while supplying an input to downstream competitors at a price that prevents them from competing effectively. A margin squeeze abuse requires the following elements to be present (Court of Appeal judgment, *Albion Water*, paragraphs 88-90):

- *The existence of two markets (an upstream market and a downstream market).*
- *A vertically integrated undertaking which is dominant on the upstream market and active (whether or not also dominant) on the downstream market.*
- *The need for access to an input from the upstream market in order to operate in the downstream market.*
- *The setting of upstream and downstream prices by the dominant undertaking that leave an insufficient margin for an (equally) efficient competitor to operate profitably in the downstream market.*

In *Albion Water*, the CAT found that Dŵr Cymru's own downstream business could not trade profitably on the basis of the upstream water transportation prices that it charged Albion Water (CAT judgment, paragraphs 871, 898 to 901).

19 Refusals to deal and denied access to essential facilities

Dominant companies are generally free to decide whether to deal with a counterparty. In exceptional circumstances, a refusal by a dominant company to supply its products or grant access to its facilities can amount to an abuse, as established in EU law. For a refusal to supply to be unlawful, the following conditions must be met:

- supply is refused (the refusal can be express or constructive, ie, the dominant company insists on unreasonable conditions for granting access to the facility);
- the requested input must be indispensable (ie, it is an essential facility – the input is not 'indispensable' if there are 'less advantageous' alternatives);
- the refusal to supply is likely to eliminate competition in the downstream market; and
- the refusal to supply is not objectively justified.

If the refusal involves intellectual property, it must also be shown that the refusal to license would prevent the emergence of a new product.

In 2009, the ORR found that a refusal by the Association of Train Operating Companies (ATOC) to license a third party to access ATOC's database of real train time information (RTTI) was not abusive. The ORR found no evidence that a refusal to supply RTTIs to the complainant would prevent a new product from emerging, nor would it 'eliminate' all competition on the downstream market for RTTI applications. ATOC had already licensed non-exclusive access for two third parties that were producing downstream applications that had the same functionalities as those previously supplied by the complainant.

20 Predatory product design or a failure to disclose new technology

Predatory product design is not a well-established category of abuse in UK competition law and the circumstances in which product design could be treated as anticompetitive are likely to be narrow.

In *Streetmap v Google*, the High Court considered allegations that Google had abused its dominant position in general search services by including a clickable Google Maps image on its search engine results page. The High Court held that since this product design had a pro-competitive effect in general search services (where Google was alleged to be dominant), any restrictive effect on competition in the related online maps market (where Google was not dominant) would need to be 'appreciable' for there to be a possible abuse.

Roth J explained that:

> *it is axiomatic... that competition by a dominant company is to be encouraged. Where – as here – its conduct is pro-competitive on the market where it is dominant, it would to my mind be perverse to find that it contravenes competition law because it may have a non-appreciable effect on a related market where competition is not otherwise weakened. Accordingly, I consider that in the circumstances of the present case a de minimis threshold applies. For Google's conduct at issue to constitute an abuse, it must be reasonably likely to have a serious or appreciable effect in the market for on-line maps.*

As regards failure to disclose new technology, in the ongoing patent infringement dispute *Unwired Planet v Huawei*, the defendant has alleged an abuse of dominance by the claimant for failing to offer a licence to standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. This follows a series of recent EU cases concerning abusive conduct by parties seeking injunctions in respect of SEPs without offering licences on FRAND terms to willing licensees (*Huawei v ZTE, Motorola* and *Samsung*).

21 Price discrimination

Section 18(2)(c) of the Competition Act 1998 identifies potentially unlawful price discrimination as 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

Abusive price discrimination requires proof that: (i) equivalent situations are being treated in a non-equivalent manner (or vice versa) without legitimate commercial reasons; and (ii) customers are placed at a competitive disadvantage relative to other trading parties to such a degree that risks foreclosing equally efficient competitors; and (iii) the difference in prices cannot be justified by difference in costs or other objective criteria.

In *EWS Coal Haulage Contracts*, the ORR found that EWS had engaged in discriminatory pricing by supplying coal haulage at different rates to different customers. It charged a higher price to one customer (ECSL) compared with other customers. This resulted in ECSL losing business. It was relevant the ECSL was also a competitor of EWS and internal documents showed that EWS' intention was to 'reduce the threat that ECSL posed to its position in the market for coal haulage' (¶B100).

Abuse of dominance rules also cover non-price discrimination. In 2011, the High Court found that Heathrow Airport unlawfully discriminated against rival valet service operators by requiring them to operate from airport car parks rather than terminal forecourts, where Heathrow Airport's in-house valet service operated (*Purple Parking v Heathrow Airport*):

- The relevant 'transaction' was the granting of access to Heathrow Airport for valet services, which was 'equivalent' for in-house and third party providers.
- Requiring third-party valet services to operate from different locations amounted to applying 'dissimilar conditions'.
- It was necessary to show that Heathrow Airport's conduct 'has an anticompetitive effect felt by the consumer', which in the present case was met owing to reduced competition and likely higher prices.

22 Exploitative prices or terms of supply

Section 18(2)(a) of the Competition Act 1998 refers to 'directly, or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

The test for excessive pricing follows two stages: (i) the difference between the dominant company's costs incurred and the price charged is excessive; and (ii) the imposed price is either unfair in itself or when compared to the price of competing products. The Court of Appeal has established that 'the cost of compilation plus a reasonable return' only deals with the first limb of the test and is not therefore sufficient to show an excessive price (*Attheraces*, paragraph 218).

Excessive pricing cases have traditionally been rare at the EU and UK levels, in part owing to the difficulty of defining the point when a price becomes 'excessive'. And in *Napp* the excessive pricing allegation was tied closely to the claim of predation.

In December 2016, though, the CMA issued an infringement decision finding that Pfizer and Flynn Pharma had exploited their dominance in the manufacture and supply of phenytoin sodium capsules by charging excessive and unfair prices. In September 2012 Pfizer sold UK distribution rights for its Epanutin drug to Flynn, which de-branded the drug, thereby removing it from price regulation. Since September 2012, the CMA alleged that Flynn supplied the drugs to UK wholesalers and pharmacies at prices between 2,300 per cent and 2,600 per cent higher than those they had previously paid for the drug. According to the CMA 'patients who are already taking phenytoin sodium capsules should

Update and trends

An effects-based approach
A critical issue in abuse of dominance cases is the assessment of anticompetitive effects – an area in which the European Commission and EU courts have been criticised for failing to carry out sufficiently detailed analyses. Increased public enforcement and private standalone actions are providing the CAT and civil courts in the UK with an opportunity to develop a distinctive approach. It is encouraging that the High Court in *Google v Streetmap* emphasised the need to review carefully the effects on the market, including actual effects where the abuse has been ongoing for some time. In this regard, the outcome of current investigations in the pharmaceutical sector will be watched closely.

The return of excessive pricing
Until recently, excessive pricing cases were rare and were thought of as an anomaly in EU and UK competition law. The CMA is not alone in refocusing on this issue – the Italian competition authority's investigation of Aspen and a recent speech by Commissioner Vestager may be indicative of a broader trend. However, the CMA's record fine in *Pfizer/Flynn Pharma* and the ongoing investigation into Actavis raise the need for clear, limiting principles in exploitative abuse cases. As the Court of Appeal noted in *Attheraces*, article 102 TFEU 'is not a general provision for the regulation of prices'.

Open questions on Brexit
Antitrust enforcement does not take place in a political vacuum, and Brexit raises several questions for the development of UK competition law. What weight will be given to European Commission decisions and judgments of the Court of Justice? Will infringement decisions of the European Commission remain binding for the purposes of follow-on damages actions? What level of cooperation can we expect between the UK and other European antitrust agencies? So far, there are more questions than answers.

not usually be switched to other products, including another manufacturer's version of the product'. The NHS therefore had no alternative to paying the new higher prices.

Pfizer and Flynn have appealed, arguing, inter alia, that the CMA applied an erroneous 'cost plus' measure, and ignored the fact that their product was sold at prices below relevant benchmarks, such as comparable phenytoin tablet products.

The CMA also has an open investigation into excessive prices being charged for hydrocortisone tablets (*Actavis*). This is consistent with a greater focus on excessive pricing in the pharmaceuticals sector among other European antitrust agencies (as well as the European Commission) and the CMA's identification of healthcare and public services as an antitrust enforcement priority.

23 Abuse of administrative or government process

UK competition authorities have investigated abuses of process as a form of abuse of dominant position, particularly in the pharmaceutical sector.

In *Gaviscon*, Reckitt Benckiser withdrew its Gaviscon Original product from sale to the NHS when the product no longer benefited from patent protection, replacing it with a similar (patent-protected) product, Gaviscon Advance. The OFT found that this made it more difficult for clinicians to prescribe generic alternatives to Gaviscon Original rather than Gaviscon Advance, owing to the configuration of the NHS computer system. The OFT imposed a fine of £10.2 million.

The CMA has also issued infringement decisions in relation to 'pay-for-delay' agreements whereby GlaxoSmithKline (GSK) made payments to several generic drug producers, allegedly to delay their entry into the market. These payments totalled more than £50 million and were made as part of a broader settlement of a patent infringement dispute. The CMA challenged these agreements on the basis that they constituted an abuse of dominance and were also restrictive under Chapter I Competition Act 1998 or article 101 TFEU.

The case is currently under appeal. The appellants argue that the CMA was wrong to categorise the agreements as 'by object' restrictions of competition. Moreover, GSK had actually asserted its rights over paroxetine against generic manufacturers after they attempted to enter the market. Since GSK won injunctions against the generic manufacturers, it was in a different position to patent-holders who knew their patents might not prevent generic entry and paid generics suppliers to delay market entry.

24 Mergers and acquisitions as exclusionary practices

See questions 5 and 6.

25 Other abuses

Section 18 of the Competition Act 1998 lists examples of conduct that may be treated as abusive, though the categories of possible abuses are not closed or exhaustive. The *Gaviscon* and *GlaxoSmithKline* cases demonstrate that the CMA is willing to investigate new forms of conduct that it believes to be abusive. That said, the abusive nature of conduct cannot be simply asserted; it requires a full assessment of the conduct's effects on competition.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The CMA is the primary public enforcer of abuse of dominance rules. In addition, the following regulators have concurrent powers to enforce competition law in their sectors:

- Civil Aviation Authority (air traffic and airport operation services);
- Financial Conduct Authority (financial services);
- NHS Improvement (healthcare services);
- Northern Ireland Authority for Utility Regulation (gas, electricity, water and sewerage services in Northern Ireland);
- Ofcom (electronic communications, broadcasting and postal services);
- Office of Gas and Electricity Markets (Ofgem) (gas and electricity);
- Office of Rail and Road (ORR) (railway services);
- Payment Systems Regulator (payment systems); and
- Water Services Regulation Authority (Water and sewerage).

The CMA and concurrent competition enforcers have extensive investigation powers, including issuing requests for information, which may result in penalty payments if the company does not respond in time (or at all). In April 2016, the CMA imposed a fine for the first time for failure to provide the requested information (*Pfizer*).

The CMA can conduct unannounced inspections ('dawn raids') at a company's premises, and it can require individuals to attend interviews provided they have a connection with a business which is a party to the investigation. The CMA can also carry out inspections of private premises if the Court or CAT has issued a warrant.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

The CMA and concurrent competition authorities have the following extensive powers to impose sanctions and remedies.

Fines
Fines can be up to 10 per cent of the undertaking's worldwide turnover in the last business year and are calculated according to the CMA's 2012 guidance (taking account of factors like duration, aggravating or mitigating factors, deterrence, proportionality and settlement discounts) (OFT 423). The largest fine that the CMA has imposed for an abuse of dominance is the £84.2 million fine imposed on Pfizer for excessive pricing.

An undertaking may be fined only if its conduct was intentional or negligent. 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.

Remedies
The CMA and concurrent competition authorities may issue directions as they consider appropriate to bring an abuse of dominance to an end, which can be enforced through the civil courts (sections 33–34, Competition Act 1998). The CMA has no power to impose structural remedies, although it is possible for an investigation to be closed on the basis of structural commitments (Severn Trent).

Individual sanctions
The CMA and concurrent competition authorities cannot sanction individuals directly for an abuse of dominance. They may, however, apply for a competition disqualification order that prevents an individual who was a director of an infringing company from being a company director for up to 15 years. The court must be satisfied that the individual's conduct makes him unfit to be a company director.

Commitments
The CMA and concurrent competition authorities have the power to accept binding commitments from an undertaking to bring the suspected infringement to an end. An undertaking can thereby avoid a finding of an infringement and a fine.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The CMA and concurrent competition authorities can impose sanctions (as well as interim measures) directly.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The CMA's enforcement activity has grown considerably in the past year, particularly as market studies and investigations draw to a close, and enforcement remains a high priority.

In 2016 alone, the CMA issued eight decisions and opened nine new cases (concerning the Chapter I and/or Chapter II Prohibitions).

As of 15 February 2017, the CMA has 14 open antitrust cases (in which no infringement, commitment or other final decision has been taken), of which six involve suspected abuses of dominance.

Michael Grenfell, Executive Director of the Enforcement Directorate at the CMA, observed in February 2017 that 'with no greater resources than in the previous year, we have managed a big uptick in enforcement activity, and there is no reason that we shouldn't be able to sustain that'. And in January 2017 Andrea Coscelli, acting Chief Executive of the CMA, predicted that '2017 is going to be a big year for judgments and hopefully cases as well.'

Recent abuse of dominance probes have focused on the pharmaceutical sector, where the CMA has three open investigations. The recent high-profile infringement decisions in the 'pay-for-delay' (*GlaxosSmithKline*) and excessive pricing (*Pfizer/Flynn Pharma*) cases resulted in high fines (£37.6 million on GlaxoSmithKline and £84.2 million on Pfizer). By contrast, from 2012 to 2014 the CMA imposed only £65 million of fines in total.

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).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

In *EWS Railway v E.ON* the High Court held that contractual terms that infringed article 102 and the Chapter II Prohibition were void from the moment the contract was concluded. Since those clauses could not be severed, the contract as a whole was void and unenforceable.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Two types of private action exist in the United Kingdom: follow-on actions and stand-alone actions. A follow-on action for damages is founded on an infringement decision by a UK competition authority or the European Commission, which binds the Court or the CAT. The claimant therefore only needs to show loss and causation. In a stand-alone action, the claimant must also prove that the defendant infringed competition law.

Since October 2015, stand-alone actions and follow-on actions can be brought before the CAT as well as the civil courts, both of which have jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality.

The CAT also has the power to admit collective actions for damages on an opt-in or opt-out basis (a 'collective proceedings order'). The claimant has to show that it is a suitable representative and that the claims in question are sufficiently similar to be brought in collective proceedings.

UK draft Regulations that seek to implement the EU Damages Directive will address limitation periods for bringing private actions, disclosure, and the weight to be afforded to findings of competition authorities and courts in other EU member states.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes. 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.

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In exceptional circumstances, where compensatory damages would be an inadequate remedy, damages may in principle be awarded on a restitutionary basis (ie, an account of the profits earned unjustly by the defendant), although this has not happened in practice.

UK draft Regulations that seek to implement the EU Damages Directive prohibit awards of exemplary damages in antitrust actions. Previously, exemplary damages had been awarded in *Cardiff Bus*.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Any person who is found to have infringed article 102 or the Chapter II Prohibition by the CMA or a concurrent UK competition authority has a right of appeal to the CAT, which can hear appeals on points of fact or law. Further appeals (on points of law) can be made to the Court of Appeal.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

No.

United States

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General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

Section 2 of the Sherman Act, 15 USC section 2, is the primary US antitrust statute that applies to monopolies. US law recognises three separate violations arising under this statute:

- monopolisation, which requires possession of monopoly power in the relevant market and anticompetitive conduct that helps to obtain or maintain that power;
- attempted monopolisation, which requires a dangerous probability of achieving monopoly power, anticompetitive conduct that threatens to help achieve that power, and a specific intent to monopolise; and
- conspiracy to monopolise, which requires a conspiracy, an overt act in furtherance of the conspiracy and a specific intent to monopolise.

Section 5 of the Federal Trade Commission (FTC) Act, 15 USC section 45 – which is enforced solely by the FTC and prohibits 'unfair methods of competition' – also applies to monopolists. Section 5 probably reaches more broadly than the Sherman Act, as the US Supreme Court has stated that there are more 'unfair methods of competition' than those prohibited by the Sherman Act.

Many US states have statutes that prohibit monopolisation or unfair methods of competition which are comparable to section 2 of the Sherman Act or section 5 of the FTC Act.

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

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Monopoly power is not defined by statute, but is defined by the case law as the ability to control prices or exclude competition. It can be proven either through direct evidence of actual price increases or the exclusion of competitors or, more typically, through indirect evidence of high market shares plus barriers to entry. A share of below 50 per cent generally is not enough to support the inference of monopoly power. As shares increase above 50 per cent, the larger the share, the more likely they are to support the inference of monopoly power, with shares in the 70–80 per cent range generally enough. Other factors that are relevant when assessing the existence of monopoly power include the size and strength of competitors, potential future competition, price sensitivity, pricing trends, stability in shares and, in regulated industries, the scope and nature of regulation.

Monopoly power is a required element for monopolisation. As explained further in question 6, attempted monopolisation claims require only a 'dangerous probability' of achieving monopoly power and conspiracy to monopolise claims arguably require only a specific intent to monopolise. US law does not recognise the concept of relative dominance.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The focus of the Sherman Act is economic, specifically, the preservation of competition and the promotion of efficiency and consumer welfare.

Section 5 of the FTC Act prohibits 'unfair methods of competition.' In an August 2015 Statement of Enforcement Principles Regarding Unfair Methods of Competition under section 5, the FTC stated that it will be guided by 'the promotion of consumer welfare' in applying section 5. However, some have suggested that section 5 could also be used to address various non-economic issues, such as environmental protection, employment or income equality.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There are a variety of sector-specific regulatory regimes at both the federal and state level, including in telecommunications, broadcasting, securities, energy, healthcare, transportation and agriculture. Some regulators can impose rate regulation (such as with public utilities), which may be appropriate in certain cases involving natural monopolies, or other rules that can limit monopolistic behaviour.

Generally speaking, all firms – including regulated firms – must comply with the antitrust laws. However, there are certain exemptions under federal statute, which are often industry specific. For example, certain insurance practices that are regulated by state law are exempt from the federal antitrust laws under the McCarran-Ferguson Act. In certain limited circumstances, notably involving the securities laws, courts have also found there is an implied immunity for certain conduct from the antitrust laws where there is a serious risk of conflict between the antitrust laws and a comprehensive regulatory regime. See *Credit Suisse Securities (USA) LLC v Billing*, 551 US 264 (2007).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

All types of entities are subject to the laws against monopolisation.

Federal government entities are immune from suit under the antitrust laws. State government entities – including the state legislature, highest court and executive – are also immune. State agencies and local governments (such as cities, counties and municipalities) are immune when the action is taken pursuant to a clearly articulated state policy to replace competition with regulation. The conduct of private entities can also be immune if the action is taken pursuant to a clearly articulated state policy and actively supervised by the state.

Private efforts to petition the government (such as lobbying) are also generally immune from antitrust challenge, provided that they are not 'shams' or do not otherwise involve an abuse of the governmental process, as discussed further in question 23.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Attempted monopolisation and conspiracy to monopolise claims do not require a showing of monopoly power.

An attempted monopolisation claim requires a showing of a 'dangerous probability' of achieving monopoly power. See *Spectrum Sports Inc v McQuillan*, 506 US 447 (1993). When evaluating if there is 'dangerous probability', courts look to many of the same factors as when evaluating whether monopoly power exists, in particular high market shares and barriers to entry. In some cases, a share of less than but close to 50 per cent can be sufficient to support an attempted monopolisation claim.

A conspiracy to monopolise claim arguably requires only showing specific intent to monopolise, with no requirement of showing that the conspiracy, if successful, would result in monopoly power. More recently, however, some lower courts have suggested that demonstrating a 'dangerous probability' of success is required.

7 Collective dominance

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

US law does not recognise collective dominance.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

Monopolisation law also applies to monopsonists. The analysis for monopsonists is similar to the analysis for monopolists.

For example, in 2007, in *Weyerhaeuser v Ross-Simmons Hardwood Lumber,* 549 US 312, the Supreme Court applied an analysis similar to predatory pricing to a predatory buying claim. The case involved a lumber manufacturer that had allegedly attempted to eliminate competition by driving up the cost of sawlogs that it was purchasing. The Court explained that a plaintiff alleging predatory buying must prove that the conduct caused the costs of the input to rise above the revenues that would be earned downstream and that the defendant has a dangerous probability of recouping its short-term losses from bidding up prices by driving out competition.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

US courts and agencies typically define markets by looking at what products or services are reasonably interchangeable substitutes for one another. Factors considered include prices, uses and quality. Geographic markets are defined by looking at the geographic area where other sellers operate and buyers can turn to. One method often used in market definition is to ask whether a hypothetical monopolist within a putative market could profitably impose a small, non-transitory price increase (typically 5 to 10 per cent) above competitive levels or whether, in response, so many customers would switch to alternatives outside the market that the price increase would be unprofitable.

There are no market shares that automatically establish monopoly power, but as explained in question 2, a minimum 50 per cent share is required to find monopoly power and the greater the share above 50 per cent the more likely it is that monopoly power will be found.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Simply possessing or exercising monopoly power is not illegal under US law.

Instead, US law prohibits only anticompetitive conduct that helps to obtain or maintain a monopoly. US law often refers to this type of conduct as 'predatory' or 'exclusionary'. US law considers both the potential anticompetitive and pro-competitive effects of the conduct. Monopolisation is not subject to per se rules.

The central challenge in monopolisation doctrine is differentiating between conduct that helps to obtain or maintain a monopoly through anticompetitive means (such as exclusive contracts that substantially foreclose competitors from the market without an offsetting pro-competitive justification) as opposed to conduct that helps to obtain or maintain a monopoly through pro-competitive means (such as introduction of a superior or lower cost product). In general, conduct that helps a firm gain or maintain a monopoly only because it makes the firm more efficient is generally viewed as pro-competitive, while conduct that otherwise impairs the efficiency of rivals could be anticompetitive. To establish illegal monopolisation, it is not enough to show that a particular competitor has been harmed; indeed, pro-competitive conduct, like offering a better product or lower prices, will naturally harm competitors. Instead, conduct must harm competition as a whole to constitute monopolisation.

There is no definitive list of what conduct can constitute monopolisation, but the main categories that US law has recognised include predatory pricing, exclusive dealing, loyalty discounts, tying or bundling, refusals to deal and abuses of governmental process.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

US law does not prohibit the exploitation of monopoly power. Instead, it prohibits only conduct that anticompetitively helps obtain or maintain monopoly power.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

Monopolisation requires proof of a causal connection between the anticompetitive conduct and the monopoly power. Where anticompetitive conduct is rigorously proven, US law generally permits a looser standard of proof of the causal connection. For example, in *United States v Microsoft*, 253 F.3d 34 (2001), the DC Circuit held that the causal connection can be established if the conduct 'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power'. Provided that the elements of monopoly power and anticompetitive conduct, as well as a causal connection between them, are established, the anticompetitive conduct can take place in an adjacent market to the market being monopolised. For example, in *Microsoft* the court found that Microsoft illegally maintained its monopoly in the operating system market by excluding competing internet browsers. However, if monopoly power in one market is used to obtain a non-monopoly advantage in another market, that is not sufficient to state a monopolisation claim – the anticompetitive conduct must help obtain or maintain a monopoly in some market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Beyond arguing that there is no monopoly power and no anticompetitive effect, a defendant can argue that the conduct has pro-competitive effects. Pro-competitive effects include reducing costs, providing higher-quality products, stimulating investment and preventing free-riding. Often, a burden-shifting analysis is applied in monopolisation cases, where the plaintiff must first establish anticompetitive effects, then the defendant must provide a pro-competitive justification, and then ultimately the burden is on the plaintiff to prove that the anticompetitive effects outweigh the pro-competitive benefits.

Specific forms of abuse

14 Rebate schemes

Loyalty conditions can have similar pro-competitive and anticompetitive effects as exclusive dealing (see question 16). Loyalty conditions typically are less than 100 per cent exclusive, but instead condition pricing on a customer making 80 per cent or 90 per cent of its purchases from a particular supplier. Some courts apply an exclusivity analysis to loyalty conditions, focusing on what portion of the market is foreclosed. Other courts have analysed loyalty conditions by applying a predatory pricing analysis, suggesting that loyalty conditions can only be potentially anticompetitive when they result in a price that is below cost and where there is a dangerous probability that the monopolist will recoup its losses over time (see question 17). Sometimes, loyalty conditions can be analysed similarly to tying and bundling by viewing a customer's demand as consisting of both 'contestable' demand (that is, the portion that might be purchased from competitors) and 'incontestable' demand (that is, the portion that would be purchased from the monopolist in any event).

15 Tying and bundling

Tying can have both pro-competitive and anticompetitive effects. The potential pro-competitive effects include reducing costs, improving quality, efficiently metering consumption and shifting risk. The potential anticompetitive effects include helping a monopolist foreclose rivals in the tied market, which can both lead to increased market power in the tied market and protect market power in the tying market (eg, because there is partial substitution between the two markets or because a position in the tied market makes it easier to enter or expand in the tying market). Even if rivals are not foreclosed, tying can increase monopoly profits through price discrimination or extraction of consumer surplus.

Under US law, a tying claim requires that the defendant have market power in the tying product, that the tying and tied items be separate products, that there be a tying condition and that the tying affect a not insignificant volume of commerce. (Proving substantial foreclosure is not a requirement; all that is required is that a not insignificant volume of commerce be affected.) In addition, ties can be justified by pro-competitive efficiencies. Although some older Supreme Court precedents could be read otherwise, in *Illinois Tool Works v Independent Ink*, 547 US 28 (2006), the Supreme Court clarified that tying arrangements can have pro-competitive effects and lower courts have considered pro-competitive effects in evaluating tying. In addition, in early 2017 the Department of Justice (DOJ) and FTC updated their joint Antitrust Guidelines for the Licensing of Intellectual Property and explained that they will consider both the anticompetitive effects and pro-competitive justifications of tying.

Bundling is a less extreme version of a tie, where instead of an absolute refusal to sell the two products individually, there is a price or other benefit from buying the products together rather than separately. Bundling has similar potential pro-competitive and anticompetitive effects as tying. Some courts have found that bundling can be potentially anticompetitive if it forecloses a substantial share of the market. Other courts have suggested that bundling cannot be anticompetitive unless it results in prices that are below cost. In applying this test, courts often apply a 'discount attribution test,' which takes the entire price discount across all bundled products, applies the entire discount to the individual price of the competitive product and then compares the resulting price to the cost of the competitive product.

16 Exclusive dealing

Exclusive dealing can have both pro-competitive and anticompetitive effects. The potential pro-competitive effects include reducing uncertainty, encouraging relationship-specific investments and facilitating efficient contracting. The principal potential anticompetitive effect is that the exclusive dealing will foreclose rivals from so much of the marketplace that it impairs rival efficiency, such as by depriving rivals of economies of scale, access to the most efficient distribution channels, or network effects, among other possible types of harm. Accordingly, exclusive dealing does not violate the antitrust laws unless it forecloses a 'substantial share' of the relevant market. Some courts have suggested that foreclosure of as little as 20–30 per cent may suffice, while others have suggested that 40–50 per cent may be required. Some courts have suggested that the foreclosure required to sustain a claim may be somewhat lower where the defendant is a monopolist.

17 Predatory pricing

Predatory pricing is actionable either as monopolisation or under a separate statute called the Robinson-Patman Act. The substantive standards are similar, although the Robinson-Patman Act may reach more broadly and apply to conduct by oligopolists as well as monopolists.

US law imposes rigorous requirements to sustain a predatory pricing claim. Specifically, a plaintiff must prove that the defendant's prices are below cost and that the defendant has a 'dangerous probability' of recouping the losses that it incurs when charging below-cost prices by raising its prices above competitive levels after driving competitors from the market. See *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 203 (1993). Although the Supreme Court has not expressly adopted a particular measure of cost, almost all courts have required that the price be below an appropriate measure of incremental cost.

18 Price or margin squeezes

A price or margin squeeze is when a vertically integrated firm charges high prices for an upstream input and low prices for the downstream product, such that a competitor that is not vertically integrated cannot afford to compete because it must pay high prices for an input while charging low prices downstream. Under US law, a price squeeze is not an independent basis of liability absent an upstream duty to deal with competitors or downstream predatory pricing. See *Pacific Bell Telephone Co v linkLine Communications Inc*, 555 US 438 (2009).

19 Refusals to deal and denied access to essential facilities

US law generally does not impose a duty to deal with competitors, even on monopolists. However, in limited situations, US law has found a duty to deal where:

- a monopolist over an input refuses to supply the input to its downstream competitors;
- the refusal helped create or maintain a monopoly;
- the monopolist had ceased a prior, voluntary and profitable course of dealing with the competitors;
- the monopolist discriminated on the basis of rivalry by refusing to deal with its competitors while continuing to deal with non-competitors; and
- the refusal to deal lacked a pro-competitive justification.

Potentially, a refusal to deal claim could be based on a constructive refusal to deal, even if the monopolist did not absolutely refuse to deal (eg, if the monopolist set such a high price for the input that it was essentially equivalent to refusing to deal at all).

Lower courts have also recognised an 'essential facility' claim for monopolisation where:

- the monopolist has control of a facility that is necessary for rivals to compete;
- the monopolist has denied the use of the facility to the rival;
- rivals cannot practically duplicate the facility; and
- providing access is feasible.

The US Supreme Court, however, has never condoned the essential facilities doctrine; instead, it has adopted only the refusal to deal doctrine outlined above.

20 Predatory product design or a failure to disclose new technology

US law is generally reluctant to second-guess product design decisions. The antitrust laws encourage innovation, and courts and regulators are not well positioned to evaluate and weigh the pro-competitive and anticompetitive effects of product design decisions. Thus, US law is unlikely to find that a product design decision constitutes monopolisation, unless the product design change clearly is not an improvement and has no benefit to customers.

US law also generally does not impose liability for failure to disclose technology changes.

Update and trends

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

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

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

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

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

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

21 Price discrimination

Price discrimination is not an independent basis of monopolisation liability. Instead, price discrimination only constitutes monopolisation if it is also predatory.

The Robinson-Patman Act, which is not specific to monopolists, prohibits certain discriminatory pricing (even if it is not predatory) where there are 'reasonably contemporaneous' sales of commodities to multiple customers that compete downstream. Although the statute requires showing a reduction in competition, US case law generally infers that effect from the existence of a substantial price differential over a substantial period of time. In practice, however, there is essentially no enforcement of the Robinson-Patman Act by regulators, and private cases are difficult to win because the private plaintiffs must prove that they suffered antitrust injury and, if they are seeking damages, the amount of damages. The Robinson-Patman Act does not prohibit discriminatory pricing if the sale does not involve commodities, if the favoured and disfavoured customers do not compete, or if the products sold are not of like grade and quantity. A number of other defences are available including that the pricing reflected a good-faith effort to meet a competitor's low price, that the price differential was justified by differences in cost or changing market conditions, that the lower price was available to the buyer that paid the higher price and that the lower price reflected a functional discount for services provided by the customer (eg, a lower price to distributors may reflect the value of their distribution services).

22 Exploitative prices or terms of supply

US law does not recognise exploitative abuses.

23 Abuse of administrative or government process

Valid, genuine efforts to petition the government are immune from liability under the antitrust laws (see question 5). The immunity extends to the direct effects of government action, as well as indirect effects that are incidental to the petitioning effort. However, abuse of government processes can constitute monopolisation. 'Sham' litigation that is both objectively and subjectively baseless can be monopolisation. See *Professional Real Estate Investors v Columbia Picture Industries*, 508 US 49 (1993). Other abuses of governmental processes include patterns of repetitive claims regardless of the merits to impose costs on competitors (see *California Motor Transp Co v Trucking Unlimited*, 404 US 508 (1972)); obtaining a patent through fraud (see *Walker Process Equipment v Food Machinery & Chemical Corp*, 382 US 172 (1965)); and making deliberate misrepresentations to a government agency promulgating a standard (see the FTC's action in *In the Matter of Union Oil Company of California (Unocal)*).

24 Mergers and acquisitions as exclusionary practices

Mergers are typically challenged under section 7 of the Clayton Act, 15 USC section 18, which prohibits mergers that 'substantially … lessen competition' or 'tend to create a monopoly'. However, mergers that help obtain or maintain a monopoly can also be challenged as monopolisation.

25 Other abuses

As mentioned, there is no definitive list of the types of conduct that can constitute monopolisation under US law.

In certain extreme cases, tortious conduct interfering with a competitor's business can be monopolisation. For example, *Conwood v United States Tobacco Co*, 290 F.3d 768 (6th Cir 2002), involved a monopolisation claim against a defendant smokeless tobacco manufacturer that removed and destroyed its competitor's display racks and advertising from retail stores without the permission of the retailers. In upholding the jury verdict for the plaintiffs, the court noted that tortious activity ordinarily does not constitute monopolisation, but found that point-of-sale advertising was particularly important in the smokeless tobacco industry given regulatory restrictions on mass advertising.

Again in certain extreme cases, product disparagement or false or misleading advertising might also be enough to support a monopolisation claim. Some courts have suggested that to sustain this type of claim, the plaintiff would need to prove that the statement was clearly false, clearly material, prolonged, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter and not readily susceptible to neutralisation or other offset by rivals. Other courts have applied both stricter and more lenient standards.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The DOJ and the FTC are the federal regulators with primary responsibility for enforcement against monopolisation. (Some industry-specific regulators have enforcement authority with respect to their industry.) Investigations can start in a variety of ways, including on the regulator's own initiative (eg, learning about conduct from the news), complaints from interested parties, or requests from other governmental actors (eg, requests from the US Congress).

The investigatory powers of both regulators are extensive and include the powers to subpoena documents and data, compel testimony and require written responses to interrogatories.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Available remedies in monopolisation cases brought by regulators include injunctive relief and other equitable remedies, as well as civil penalties. Injunctive relief can include structural remedies (such as divestitures or, in extreme cases, dissolving or splitting the defendant firm) or behavioural remedies (such as prohibiting the defendant from engaging in certain activities or requiring that the defendant deal with rivals on certain terms). Equitable relief can also include monetary equitable remedies, such as disgorgement of profits or restitution. Although monetary equitable remedies are unusual, they can be quite significant, and in one case the FTC obtained monetary equitable relief in a settlement of over US$1 billion.

Although criminal sanctions are theoretically available in monopolisation cases, they are not pursued in practice.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The DOJ must bring monopolisation actions in federal court.

The FTC can bring monopolisation actions in federal court, but it also can bring enforcement actions in its internal administrative courts. The FTC must sue in federal court to obtain injunctions, monetary equitable remedies and civil penalties. But the FTC can issue forward-looking 'cease and desist' orders after an administrative hearing, and it has very broad latitude in fashioning these orders to remedy the misconduct – it can require divestitures, prohibit otherwise lawful business activities that could be used to facilitate an unlawful activity, and require affirmative conduct to restore competition.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The agencies regularly investigate monopolisation cases, but bring a relatively limited number of cases, at most a few cases a year.

Investigations can take significant time – with some lasting multiple years – and if a lawsuit is brought, it generally takes well over a year to reach an initial decision and longer through the appeals process. Thus, enforcement decisions often do not occur until long after the challenged conduct has occurred, during which time the industry may have changed, making it difficult to effectively remedy violations.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

A contract that violates the antitrust laws is unenforceable. Whether the particular offending provisions can be severed from the rest of the contract is determined on a case-by-case basis.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private parties can bring claims under the antitrust laws, although private parties cannot enforce the FTC Act. Private plaintiffs can seek damages or injunctive relief.

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

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32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Private parties, as well as US states suing on their own behalf or on behalf of their residents, are entitled to three times their actual injury plus litigation costs and reasonable attorney fees. (There are a few exceptions that typically do not apply in monopolisation cases – eg, a defendant in a cartel case that obtains amnesty and cooperates with private plaintiffs is subject only to single damages.)

To obtain damages, beyond proving an antitrust violation, a plaintiff must prove that it suffered injury, that the violation was a material and proximate cause of its injury, and that its injury was an 'antitrust injury,' meaning that it resulted from the anticompetitive effects of the violation. A private plaintiff must also prove the amount of damages with reasonable certainty. Typically, damages are measured as the difference between the plaintiff's position in the actual world and the position that the plaintiff would have been in but for the anticompetitive effects of the violation.

Damages can be significant. For example, in *Conwood v US Tobacco*, the plaintiff was awarded US$1.05 billion after trebling in a case alleging that a smokeless tobacco manufacturer had removed and destroyed a competitor's display racks and advertising from retail stores without the permission of the retailers.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Cases brought in federal district court by regulators or private plaintiffs are entitled to an appeal to a federal appellate court. Subsequently, parties can petition for review by the US Supreme Court. On appellate review, findings of fact are given substantial deference and reversed only for clear error. Findings of law are reviewed de novo. Mixed questions of fact and law – such as how legal principles apply to particular facts – are generally reviewed on a sliding scale.

Cases brought by the FTC in its administrative courts can be appealed first to the Commission and then to a federal appellate court. In those cases, the appellate court will review whether the FTC's findings of fact are supported by substantial evidence. In addition, appellate courts generally give some deference to the FTC's conclusion that conduct violates section 5 of the FTC Act.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

As addressed in questions 1 and 6, monopoly power is not required for attempted monopolisation or conspiracy to monopolise claims.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
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