ANTIMONOPOLY & UNILATERAL CONDUCT 2020 KNOW HOW

United States

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OCTOBER 2020

GCR INSIGHT

Overview

1 What is the legal framework governing unilateral conduct by companies with market power?

Both federal and state statutes govern unilateral conduct by firms with market power. Section 2 of the federal Sherman Act covers unilateral conduct, including monopolisation and attempted monopolisation (as well as coordinated conduct including monopolisation as the result of conspiracy). 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize ... shall be deemed guilty of a felony ...".). Section 3 of the federal Clayton Act governs for example exclusive dealing arrangements "where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce". 15 U.S.C. §14. Unilateral conduct is also governed on the federal level by section 5 of the Federal Trade Commission Act, which broadly empowers the Federal Trade Commission (FTC) to police "[u]nfair methods of competition ... and unfair or deceptive acts or practices ... in or affecting commerce". 15 U.S.C. § 45.

All 50 states have some version of an antitrust statutory framework. Some states have statutory frameworks that closely parallel the Sherman Act in legislation commonly referred to as "Baby Sherman Act" statutes. Other states have adopted statutory frameworks that more broadly prohibit "unfair" or "deceptive trade practices". (See, eg, Florida Deceptive and Unfair Trade Practices Act §501.204: "Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful"). Many states have specific statutory provisions covering particular industries including, for example, fuel, alcoholic beverages and automobile dealers, as well as statutory exemptions for certain industries, including farming cooperatives and organised labour.

2 What body or bodies have the power to investigate and sanction abuses of market power?

Both the US Department of Justice Antitrust Division (DOJ) and the FTC have the authority to investigate and sanction abuses of market power on the federal level. Each state's Attorney General's office is also empowered to investigate and sanction abuses of market power on behalf of the state or on behalf of citizens of the state. Plaintiffs in federal and state civil actions, whether competitors or consumers, are commonly referred to as 'private attorneys general', with the power to sue in federal or state courts to challenge alleged abuses of market power. In federal court, the general rule is that only purchasers who buy directly from an antitrust violator have standing to sue that antitrust violator under the Clayton Act; indirect purchasers, or purchasers who are more than one step removed from the antitrust violator in the chain of distribution, cannot maintain a claim. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). In a recent case, however, the Supreme Court qualified this rule by holding that consumers who bought iPhone applications or apps through Apple's App Store had standing to sue Apple, even though most apps are created – and the prices are set – by independent developers. Apple v. Pepper, 139 S. Ct. 1514, 1519 (2019). The Court rejected Apple's "[one] who sets the price rule", finding that "direct purchasers are 'the immediate buyers from the alleged antitrust violators'… [and] the absence of an intermediary is dispositive." Idat1520.

Monopoly power

3 What role does market definition play in market power assessment?

Market power, broadly defined as "the ability to raise prices above those that would be charged in a competitive market", cannot be assessed reliably without first defining both a relevant product market and a relevant geographic market. NCAA v Bd. of Regents, 468 U.S. 85, 109 n.38 (1984). It is impossible to accurately assess the alleged effects of challenged conduct – a central inquiry in monopolisation cases – without properly assessing market structures through robust definition of product and geographic markets.

4 What is the approach to market definition?

Market definition requires an assessment of both a relevant product market and a relevant geographic market. Relevant product markets are broadly defined as products (or services) that effectively compete with each other. For example, do luxury hotels, budget motels or hostels effectively compete with each other? In two-sided markets, courts must consider the interaction between both sides of a platform when defining the relevant market. See Ohio v. American Express, 138 S. Ct. 2274, 2286 (2018). Two-sided markets involve the sale of products or services to two different groups of buyers through a transaction platform that exhibits strong indirect network effects.

The relevant geographic market is the geographic territory within which competition occurs in the relevant product market. That is, assuming a relevant product market consisting of solely luxury hotels, do luxury hotels located in central London compete with luxury hotels located 20, 30, 40 or more kilometres outside the city centre? Market definition is frequently the subject of intense economic and legal analyses and is often a key driver in the outcome of monopolisation cases.

5 How is market power or monopoly power defined?

Market or monopoly power is broadly defined as "the ability to raise prices above those that would be charged in a competitive market" (NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.38 (1984)) or the power to "exclude competition" – in a properly defined relevant market to prove liability (United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

6 What is the test for finding of monopoly power?

The monopoly power test begins with an analysis of the relevant product and geographic markets. Once the product and geographic markets are properly defined, courts can assess the level of a firm's "power" in the relevant market. Market shares are often considered a useful proxy to assess a firm's market power. Note, however, that "high" or "low" shares alone do not prove the existence or absence of market power. The existence and degree of barriers to entry – the ease with which new entrants have entered or can potentially enter the relevant market, or incumbent firms can expand output – is also key to assessing market power. Direct evidence of vigorous competition including, for example, intense price competition and/or innovation, is also an important consideration in assessing monopoly power.

7 Is this test set out in statute or case law?

The test for market power is set out in case law.

8 What role do market shares play in the assessment of monopoly power?

Market shares within a properly defined relevant market (product and geographic) are an important starting point in assessing monopoly power. Because the existence of monopoly power is so intensely tied to the unique attributes of particular relevant markets, there is no threshold share above or below which a firm will be deemed to possess or lack monopoly power. Market power assessment is also dependent on other factors including the existence and degree of barriers to entry, price competition and buyer power. There are exceptions to every rule, but in general, where completed monopolisation is alleged a 50+ per cent market share is in the range of what courts have found to be sufficient for a finding of monopoly power, 40–50 per cent can potentially be problematic, and under 30–40 per cent is generally not. In attempted monopolisation cases, a lesser showing of market power may suffice.

9 Are there defined market share thresholds for a presumption of monopoly power?

No. While lower shares tend to suggest the absence of market power and high shares the presence of market power, shares alone do not necessarily prove the existence of market power. As a practical matter, in completed monopolisation cases courts rarely find the existence of monopoly power where a firm's share of the relevant market was at or below 30 per cent (and likely to remain at or below this level for the foreseeable future).

10 How easily are presumptions rebutted?

Not applicable.

11 Are there cases where companies with high shares have been found not to exercise monopoly power?

Yes. Courts have found relatively high market shares of greater than 80 per cent to be insufficient to establish market power when balanced against countervailing evidence regarding the absence of barriers to entry, expansion by competing firms, decreasing market share trends of the incumbent firm, vigorous price competition, innovation, the degree of buyer power, and other indicia of a competitive market.

12 What are the lowest shares with which companies have been found to exercise monopoly power?

Companies with market shares of as low as 20 per cent have been found to possess market power. See, for example, U.S. v. VISA U.S.A., 344 F.3d 229, 239 (2d Cir. 2003); Toys 'R' Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000), although the precise boundaries are unclear. In 2016, for example, the influential Second Circuit Court of Appeals "decline[d] to establish any strict threshold of market share" in an appeal from a DOJ "anti-steering" case brought against American Express, but nonetheless reversed a district court judgment in favour of the DOJ in part because it concluded that American Express' 26.4 per cent market share for credit card services was not indicative of monopoly power where the district court relied on "cardholder insistence 'as a critical fact supporting American Express' supposed monopoly power". See U.S. v. American Express Co., 838 F.3d 179 (2nd Cir. 2016). The Supreme Court affirmed the Second Circuit's decision on 25 June 2018, holding that American Express' anti-steering provisions in its merchant contracts did not violate federal antitrust laws. In a 5-4 decision, the Court found that Amex provided credit card services to both merchants and consumers in a "special type of two-sided platform known as a 'transaction platform'", which it found to be a relevant market. See Ohio v. American Express Co., 138 S. Ct. 2274, 2280 (2018). It is important to consider that the finding of market power in these and other cases is virtually never based solely on market shares alone, but rather on additional factors including buyer power, entry barriers, and the intensity of price competition. Mere customer insistence or preference for one brand of product over another is a problematic basis for finding monopoly power where market shares are relatively modest.

13 How important are barriers to entry and expansion for the assessment of monopoly power?

Barriers to entry and expansion are critical to the assessment of monopoly power. Courts routinely consider the presence or absence of barriers to entry and expansion in the overall evaluation of market power. Because courts routinely hold that market share levels alone are insufficient to determine market power, assessment of barriers to entry and expansion, among other considerations, are often essential under the case law to accurately assess the existence of market power.

14 Can the lack of entry barriers negate a finding of monopoly power?

Yes. More accurately, there should be no finding of monopoly power if there is a lack of entry barriers. Low or no entry barriers, by definition, permit new entrants to participate in the relevant market and/or permit other competitors to expand output, thereby operating as an effective constraint on the incumbent's ability to exercise monopoly power – ie, "the ability to raise prices above those that would be charged in a competitive market", NCAA v Bd. of Regents, 468 U.S. 85, 109 n.38 (1984), or to exclude competitors.

15 What kind of barriers to entry are typically considered in the analysis?

Courts define barriers to entry as costs that would be borne by a new entrant that were not incurred by the incumbent firm or "factors that prevent new rivals from timely responding to an increase in price above the competitive level". U.S. v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001). Examples of barriers to entry recognised by courts include exclusive dealing contracts, intellectual property rights like patents and licensing agreements, legal licensure requirements, significant sunk costs, and certain capital requirements, primarily where the cost of obtaining capital is greater for new entrants than it was or is for incumbent firms.

16 Can countervailing buyer power negate a finding of monopoly power?

Yes. More accurately, there should be no finding of market power if buyer power is sufficiently strong. By definition, sufficiently strong buyer power eliminates the possibility that a firm could possess or exercise monopoly power – ie, "the ability to raise prices above those that would be charged in a competitive market". NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.38 (1984).

17 What if consumers can easily switch between suppliers?

The ability of consumers to easily switch between suppliers (assuming no anticompetitive coordination among said suppliers) should defeat any claim of monopoly power. If consumers can practically switch to competing firms (or threaten to do so) to obtain lower prices than those charged by the purported monopolist, then that alleged monopolist, by definition, does not possess monopoly power – ie, "the ability to raise prices above those that would be charged in a competitive market". NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.38 (1984). Once the alleged monopolist charges a supra-competitive price, consumers would simply switch to alternative suppliers thereby defeating any attempted exercise of market power.

18 Are there any other factors that the regulator considers in its assessment of monopoly power?

Regulators do not consider social obligations (ie, a firm justifying challenged conduct on the basis of, for example, a desire to protect domestic jobs or protect against state-subsidised foreign competition) in assessing the technical issue of whether a firm possesses monopoly power, that is "the ability to raise prices above those that would be charged in a competitive market". NCAA v. Bd. of Regents, 468 U.S. 85, 109 n.38 (1984).

Such social considerations may be relevant in certain rule of reason cases in analysing issues of intent or whether a firm had a legitimate business justification for the challenged conduct, but such issues are separate and apart from assessing the ability of a firm to raise prices above competitive levels.

19 Are any entities or sectors exempt from the antimonopoly regime?

Yes. Certain industries are afforded specific statutory exemptions from the antitrust laws. These industries include organised labour, where employees are permitted for example to coordinate in negotiations with employers, as well as agricultural cooperatives, where members are permitted to act jointly regarding the marketing and sales of agricultural products. A unique statutory exemption applies to professional sports leagues including major league baseball.

Other industries are regulated by a statutory framework separate and apart from the federal and state antitrust statutes. For example, the Packers and Stockyards Act specifically regulates fair trade practices in the livestock and meat packing industries. Other industries with unique legal frameworks or regulators include the insurance, telecommunications, cable, natural gas and electric power industries. Many states also have specific statutory provisions covering particular industries including, for example, fuel, alcoholic beverages and automobile dealers.

20 Can companies be deemed to hold collective monopoly power?

The consistent view of modern courts is that a claim of monopolisation must be based on a single firm possessing monopoly power. That is, parallel, non-collusive conduct of multiple firms cannot support a claim for monopolisation.

21 Can the exercise of joint monopoly power or tacit oligopolistic collusion be treated as an infringement?

Courts reject monopolisation claims premised on "joint monopoly power". Monopolisation must be based on a single firm possessing monopoly power.

Collusion, however, is always an infringement. Collusion among competitors can violate any number of federal and state antitrust laws, including Sherman Act § 1, which is specifically designed to address competitor collaborations that have an adverse impact on consumers, and Sherman Act § 2, which prohibits, among other things, conspiracies to monopolise. Oligopolistic interdependent pricing, on the other hand, is lawful in the US.

22 Has the competition authority published guidance on how it defines markets and assesses market power?

The DOJ and FTC have published the Horizontal Merger Guidelines that provide a market definition paradigm specifically for merger matters. These national competition authorities have not published guidance on how to properly define markets or assess market power in non-merger matters including monopolisation cases. Practitioners must therefore look to the case law in the relevant jurisdiction to determine the appropriate method of defining markets and assessing market power.

Abuse of monopoly power

23 Is there a general definition for what constitutes abusive conduct? What does it entail?

Section 2 of the Sherman Act states that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony[.]" Section 2 covers monopolisation, attempted monopolisation and conspiracy to monopolise. Monopolisation is not enforced criminally, although technically it is a felony. The elements of proof for a criminal violation require proof beyond a reasonable doubt, while the elements of a civil violation require proof by a preponderance of the evidence.

Possession of a monopoly alone does not violate section 2. A section 2 violation requires "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident". United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). This "has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power". Id.

24 What are the general conditions for finding an abuse?

In general, to violate section 2 a company must (i) possess monopoly power in a relevant market, and (ii) have acquired or maintained that power through the use of predatory or exclusionary conduct. Defining the relevant market is the first step in an antitrust analysis, and an antitrust claim fails if the complaining party fails to establish the relevant market. The relevant market must include all products that are "reasonably interchangeable by consumers for the same purposes" from a buyer's point of view. U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956). Possession of monopoly power in a properly defined relevant market can be shown through the actual exercise of control over price or the "exclusion" of competition in the relevant market. Courts primarily look at the defendant's market share and whether significant barriers to entry exist.

The second element for a finding of monopolisation requires a showing of anticompetitive, exclusionary, or predatory conduct. This element includes both conduct used to acquire a monopoly unlawfully and conduct used to maintain a monopoly. The showing of exclusionary conduct must harm competition, thereby harming consumers. Harm to one or more competitors is generally insufficient to show exclusionary conduct. This is because "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458, 113 S. Ct. 884, 891-92 (1993). An extremely broad range of conduct has been challenged under section 2 of the Sherman Act, and a showing of 'exclusionary conduct' is therefore highly specific and can take many forms (depending on the alleged violation).

25 Is there a list of categories of abusive or anticompetitive conduct in the applicable legislation?

The Sherman Act does not contain an exhaustive list of categories of abusive or anti-competitive conduct, and it should be noted that most conduct that can be found to be 'abusive' can also be procompetitive and benefit consumers. Over the years courts have identified a number of categories of potentially abusive conduct, which include refusals to deal, exclusive dealing, certain loyalty discounts, denials of access to essential facilities, predatory pricing, misuse of government standard-setting and tying.

26 Is this list open or closed?

The list is open; that is, there is no finite list of conduct that could, theoretically, constitute monopoly conduct. The DC Circuit memorably noted in its decision affirming a judgment that Microsoft had monopolised operating systems and related product that "the means of illicit exclusion, like the means of legitimate competition, are myriad." United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam). The court noted that this often created a certain difficulty in discerning legitimate from illegitimate conduct under Sherman Act section 2: "Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern. . . The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."

27 Has the competition authority published any guidance on what constitutes abusive conduct?

Yes, both the FTC and DOJ publish a number of guidelines, which can be found at www.justice.gov and www.ftc.gov.

28 Is certain conduct per se abusive (without the need to prove effects) and under what conditions?

Having a monopoly is not per se unlawful (or unlawful at all) and is always judged under the rule of reason. The per se rule is applicable only to certain section 1 violations and requires an agreement between competitors to fix prices or rig bids, allocate customers or markets, or reduce output– and generally does not apply to single-firm conduct.

29 To the extent that anticompetitive effects need to be shown, what is the standard to demonstrate these effects?

For a showing of a section 2 violation, a plaintiff is required to show that the defendant's conduct harmed competition and consumers (harm to another competitor is insufficient). If the plaintiff is able to show an anticompetitive effect, the burden then shifts to the defendant to proffer a procompetitive business justification for its conduct, such as greater efficiency or enhanced product offerings that benefit consumers. If the defendant proffers a valid business justification, the plaintiff then has the opportunity to rebut the proffered business justification or show that the justification does not outweigh the anticompetitive harm.

30 Does the abusive conduct need to harm consumers?

Yes.

31 What defences are there to allegations of abuses of monopoly power?

Defences to allegations of abuses of monopoly power are highly specific depending on the conduct alleged. One of the most common defences is that the alleged conduct has a legitimate business justification – such as increased efficiency, decreased production costs, increased economies of scale – which outweighs any potential harm to consumers. See questions 29 and 32.

32 Can abusive conduct be objectively justified?

Even a monopolist may have a legitimate business justification for certain conduct that is allegedly "abusive" or "exclusionary". For example, the alleged conduct may benefit consumers through greater efficiency or through the availability of products or services that would otherwise be unavailable absent the alleged conduct. It is up to the courts to decide whether the challenged conduct constitutes "exclusionary behaviour".

33 What objective justifications have been successful?

For the courts, a key factor in determining what is unreasonable is whether the practice has a legitimate business justification. What constitutes a "legitimate business justification" is highly subjective and depends on the context. Some examples include maximising short-term profits, preventing free-riding, reducing costs, and providing superior products to consumers. Generally, a business justification is held to be valid when it "related directly to the enhancement of consumer welfare".

34 How is the burden of proof distributed in an abuse analysis?

See question 29. In general, the plaintiff has the burden of proof. Once the plaintiff establishes the challenged conduct, the defendant has the burden of showing a valid business justification. The plaintiff then has the opportunity to rebut the proffered business justification or show that the anti-competitive effects outweigh the proffered justification.

35 What are the legal conditions to establish an abusive tie?

A tying arrangement is an agreement by a firm to sell one product (the tying product) only on the condition that the buyer also purchases another product (the tied product) – or on the condition that the buyer will not purchase that product from any other supplier. Tying arrangements are more frequently challenged under section 1 of the Sherman Act, and generally require a showing of

- an agreement where the defendant agreed to sell one product only on the condition that the plaintiff also purchase a separate and distinct product from the defendant;
- the defendant had sufficient market power in the market for the tying product to foreclose competition in the market for the tied product;
- the alleged tying agreement involved a substantial amount of commerce; and
- the plaintiff suffered injury as a result of the alleged agreement.

36 What are the legal conditions to establish a refusal to supply or refusal to license?

Generally even a firm with monopoly power has no duty to deal with anyone. The Supreme Court has generally held that absent a voluntary prior course of dealing, refusal-to-deal claims are barred. Refusal-to-deal claims have been permitted to go forward primarily in cases where the defendant has changed a prior course of dealing, acted contrary to its own short-term economic interests, or sought to monopolise an adjacent market. Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

37 Do these abuses require an essential facility?

An essential facility is not required to establish a refusal-to-deal, but it should be noted that with very limited exceptions, even a monopolist has the right to do business, or refuse to do business, with anyone it chooses.

38 What is the test for an essential facility?

Generally, the test for an essential facility is: (i) control of an essential facility by the monopolist; (ii) a competitor's inability to duplicate the essential facility; (iii) the denial of access to the facility by the monopolist; and (iv) the feasibility of providing access. MCI Communications v. AT&T, 708 F.2d 1081, 1132 (7th Cir. 1983).

39 What is the test for exclusivity arrangements?

Exclusive dealing arrangements require a buyer to purchase products or services for a period of time exclusively or predominantly from one supplier. Exclusive dealing, even by a monopolist, is not always unlawful under section 2, and is often procompetitive. However, when a monopolist uses exclusive dealing to "impair the ability of rivals to grow into effective competitors", the monopolist can "maintain monopoly prices and thereby harm consumers". United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005); United States v. Microsoft, 253 F.3d 34, 70–71 (D.C. Cir. 2001). Generally, a monopolist's conduct threatens harm to competition if it involves "(a) exclusive dealing or similar arrangements covering a significant portion of [distribution]; (b) entry barriers or equivalent impediments making it difficult for rivals or potential rivals … to obtain efficient access to [distribution]; and (c)

resulting prolongation of the dominant firm's ability to earn monopoly profits[.]" XI Areeda & Hovenkamp, Antitrust Law paragraph 1802b at 75–76.

40 What is the test for predatory pricing?

Predatory pricing is "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run". Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986). The Supreme Court has held that to establish predatory pricing, a plaintiff must prove (i) "that the prices complained of are below an appropriate measure of its rival's costs" and (ii) "that the competitor had a reasonable prospect ... of recouping its investment in below-cost prices". Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

41 What is the test for a margin squeeze?

A price squeeze or margin squeeze involves a vertically integrated monopolist that sells its upstream input – which is required to compete in a second market – to firms that compete with the monopolist's production of a downstream product sold to end users. In Pacific Bell Telephone Co. v. linkLine Communications, 555 U.S. 438 (2009), the Supreme Court held that a price squeeze no longer provides an independent theory of liability under section 2. However, historically a price squeeze or margin squeeze could violate section 2 if the monopolist sold its upstream input (which was required to compete in the downstream market) for a price that was higher than fair, and the monopolists price in the second market was so low that its competitors could not match it.

42 What is the test for exclusionary discounts?

Exclusionary discounts can involve market share discounts, rebates and other payments to encourage purchases. The test for exclusionary discounts can be similar to predatory pricing (see question 40) – ie, the plaintiff must show that (i) the discounts caused prices to drop below the appropriate measure of the defendant's costs, and (ii) there is a dangerous probability that the defendant will recoup its losses from the predatory pricing. Or, it can involve proof that the monopolist used exclusive dealing agreements to "lock up" customers or suppliers for many years and, thus, excluded its rivals from the market (or raised their costs).

43 Are exploitative abuses also considered and what is the test for these abuses?

In the United States excessive pricing (or "monopoly pricing") by itself is not illegal under the monopoly laws.

44 Is there a concept of abusive discrimination and under what conditions does it raise concerns?

The Robinson-Patman Act prohibits certain forms of price discrimination, and applies to sales of commodities. In general, the Robinson-Patman Act prohibits price discrimination in the sale of goods of like grade or quality to competing buyers when the effect of the sales is to reduce competition. There have been no enforcement of Robinson-Patman Act violations by the DOJ and FTC in recent years, but private plaintiffs have been active.

45 Are only companies with monopoly power subject to special obligations under unilateral conduct rules?

The offense of monopolisation always requires proof of monopoly power – ie, "the power to control prices or exclude competition" – in a properly defined relevant market to prove liability. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956). Thus, a showing of monopoly power is necessary in any inquiry. In the exclusive dealing context, for example, companies with monopoly power have been held to a higher standard than non-dominant firms. Courts have held that exclusive dealing arrangements by companies without market power do not pose a threat to consumers, as the consumer can easily buy from another vendor. See United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

46 Must the monopoly power exist in the same market where the effects of the anticompetitive conduct are felt?

Generally, yes. However, under a "monopoly leveraging" theory, a dominant firm could violate section 2 if it uses monopoly power in one market to monopolise or attempt to monopolise a second market (in which the anticompetitive effects would be felt). See, eg, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n.4 (2004) (holding that leveraging a monopoly in one market to gain a competitive advantage in another does not violate section 2 absent a showing of threatened monopolisation of the second market).

Sanctions and remedies

47 What sanctions can the competition authority impose or recommend?

Sherman Act section 2 monopolisation is, technically, both a felony crime and a civil violation in the United States. 15 U.S.C. § 2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony"). Although the elements of the violations are the same, the elements of proof for a criminal violation are more rigorous, and require proof beyond a reasonable doubt, while the elements of a civil violation only require proof by a preponderance of the evidence.

It has been many decades since the DOJ has pursued criminal enforcement under Sherman Act section 2, however, and its written guidance expressly states that violations "are generally not prosecuted criminally [unless] violence is used or threatened as a means of discouraging or eliminating competition, such as cases involving organized crime". See www.justice.gov/atr/antitrust-primer-federal-law-enforcement-personnel-revised-april-2005.

Instead, all monopolisation cases brought in recent years by the Justice Department under its exclusive federal authority to enforce the Sherman Act (or by the FTC under its overlapping authority to combat monopolisation as an unfair method of competition under Federal Trade Commission Act section 5) have been civil in nature and have sought various forms of injunctive relief or structural remedies to end the monopoly conduct.

48 How are fines calculated for abuses of monopoly power?

There are no federal government fines for civil monopolisation violations and, as noted above, the DOJ has not enforced monopolisation as a criminal violation in decades (and, thus, has not attempted to impose criminal remedies against corporate monopolists, their executives or their employees). That authority, as set out in the Sherman Act, permits the imposition of fines for criminal violations in amounts not exceeding $100 million for corporations or $1 million for individuals (and imprisonment not exceeding 10 years for individuals), and the DOJ regularly obtains substantially larger criminal monetary fines in price fixing cases under the "alternative fines" statute, 18 U.S.C. § 3571(d).

Of course, violations of Sherman Act section 2 may still result in substantial financial punishment because they are also subject to private enforcement which permits private parties injured by the monopolisation, such as customers or competitors, to recover treble their lost profits or other financial damages. In recent years, a number of private monopolisation cases have resulted in judgments and settlements of more than $100 million (and some, like the Conwood v. United States Tobacco case, greater than $1 billion).

It is also worth noting that the Justice Department may also sue a monopolist to recover treble damages sustained by the United States, as a purchaser, although it has not done so in recent years.

Finally, although it was not a fine in the traditional sense, we note that the FTC recently obtained a $27 million settlement in a monopolisation case brought under FTC Act section 5 under a theory requiring the defendant to disgorge its alleged monopoly profits, and we expect it will continue efforts to expand its ability to seek disgorgement in the wake of its 2012 withdrawal of its policy statement suggesting that it would only use its discretion to seek this remedy in limited circumstances.

49 What is the highest fine imposed for an abuse of monopoly power?

Not applicable.

50 What is the average fine imposed over the past five years?

Not applicable.

51 Can the competition authority impose behavioural remedies?

Yes, but only if it prevails in a lawsuit filed in federal court. Injunctive relief, which is typically a form of behavioural remedy, has long been the primary remedy sought by the DOJ and the FTC in their monopoly enforcement efforts under Sherman Act section 2 or FTC Act section 5, respectively. At times, though, they have sought and obtained injunctive relief to require a structural remedy such as a divestiture or break-up.

The agencies have noted that behavioural remedies are, in most circumstances, effective in meeting the three goals for government monopoly enforcement efforts set out by the DOJ: (i) terminate the defendant's unlawful monopoly conduct, (ii) prevent its reoccurrence, and (iii) re-establish the opportunity for competition in the affected market.

Behavioural remedies are also consistent with long-standing Supreme Court precedent stating that adequate relief in monopolisation cases should put an end to the proscribed conduct, deny the defendant the fruits of its violation, and ensure that there remain no practices likely to result in monopolisation in the future. For example, United States v. Brown Shoe Corp., 391 U.S. 244, 250 (1968); United States v. Grinnell Corp., 384 U.S. 563, 577 (1966).

52 Can it impose both negative and positive behavioural obligations?

Yes. The DOJ and the FTC regularly seek injunctions prohibiting the alleged monopolist from engaging in certain challenged acts and, depending on the circumstances, may also seek an injunction requiring the defendant to engage in certain affirmative behaviour to ensure the violations will not recur.

Negative behavioural obligations are typically narrowly tailored to ban repetition of specific past anticompetitive acts. These cease-and-desist injunctions are thus sometimes referred to as "sin no more" provisions. In the Microsoft and Dentsply cases, for example, the court granted the Justice Department's request that the defendants be enjoined from engaging in exclusive dealing and tying that had the effect of foreclosing competitors from a significant portion of the market. In cases challenging branded pharmaceutical companies' efforts to delay generic drug makers from entering the market, the agencies have sought and obtained injunctions prohibiting the misuse of the Food and Drug Administration's Orange Book listings based, for example, on false and misleading submissions of information.

These negative behavioural obligations can go beyond the specific challenged conduct if the agencies conclude there is a risk the defendant may try to maintain or expand its monopoly through conduct beyond that identified in the complaint. These "fencing-in" provisions often prohibit conduct similar in nature to the conduct challenged in the complaint; for example, a monopolist that employed one specific type of bundled rebate to foreclose the market may be enjoined from offering other types of exclusionary rebates. Fencing-in provisions can be much broader than that, however, and the Supreme Court has suggested that it might be necessary to enjoin a monopolist from engaging in acts that may be "entirely proper when viewed alone" if they could contribute to ongoing monopolisation. United States v. Gypsum Co., 340 U.S. 76, 89 (1950).

The DOJ has noted that prohibitory injunctions are the appropriate remedy for most monopoly violations, but reserved the right to seek injunctions imposing affirmative obligations on the defendant when it concludes that such obligations are necessary to meet its three enforcement goals. An example of this type of affirmative injunctive remedy is a mandate that the monopolist grant its competitors access to key physical or intellectual property assets the monopolist was using to foreclose the market. That type of mandate has taken a range of forms depending on the circumstances. Monopolists have been required to sell, lease or license certain physical assets or intellectual property rights and to grant interconnection to its assets or network.

Not surprisingly, though, injunctive remedies raise a host of complexities, particularly those requiring the defendant to undertake affirmative obligations such as licensing its intellectual property rights or interconnecting to its network.

The DOJ and the FTC have thus noted that both negative and affirmative injunctions must be carefully structured to avoid chilling legitimate pro-competitive conduct, such as rebates or other price concessions, and must continue to incentivise innovation and minimise the ability of competitors to free-ride on the defendant's innovation.

The remedy must also be readily administrable by the judiciary and avoid embroiling the courts in day-to-day business decisions. The Microsoft and Trinko cases illustrate some of the complexities the judiciary faces when evaluating forced interconnection, for example. Finally, the agencies recognise that any injunctive relief must keep to the goals of remedying precise anticompetitive conduct and not fall prey to the temptation to punish defendants, reward competitors or rewrite the competitive landscape to pick winners and losers or promote broader and unwarranted objectives.

53 Can the competition authority impose structural remedies?

Yes. The DOJ has a 100-year track record of breaking monopolists into smaller companies and requiring divestitures reaching back to the AT&T Ma Bell case and even further back to the Standard Oil case. For just as long, though, the agencies and courts have recognised that a forced break-up is the 'most drastic' of all remedies and often the most fraught with difficulty for the courts.

Although the agencies have substantial experience requiring divestitures in the context of mergers that are under Hart–Scott–Rodino Act review, those mergers are unconsummated. As a result, separating out one business or asset class from that proposed merger is often fairly straightforward, though, of course, still complex in its own right. In contrast, though, dismantling a fully integrated and long-standing monopolist is a significantly more complex undertaking and one that the courts are not particularly well equipped to oversee because it requires microscopic decisions about intertwined physical and intellectual property assets, corporate subsidiaries and affiliates, firm infrastructure and even personnel.

Not surprisingly, then, the government's occasional efforts at forced break-ups, such as AT&T, have received mixed reviews over the subsequent years, and both the courts and the agencies recognise that a structural break-up of a monopolist should be a remedy of last resort.

54 Can companies offer commitments or informal undertakings to settle concerns?

Yes, although it is exceptionally rare for the authorities to accept voluntary, unilateral promises that the challenged behaviour will change. Instead, the normal course is for any commitments to be embodied in a formal settlement agreement that is enforceable in federal court.

One, and perhaps the only, notable exception in recent years was the determination by the FTC to accept a voluntary promise from Google that it would change its behaviour in order to resolve the agency's long-running investigation into its alleged monopoly conduct. The Commission's acceptance of Google's promises was highly unusual and sparked a number of complaints from market participants and commentators that the Commission should have required Google to embody its promises in a formal agreement or consent decree enforceable before the Commission and in court.

55 What proportion of cases have been settled in the past five years?

There is no perfectly reliable public data on the proportion of government monopoly investigations that settle each year. The DOJ and FTC annual workload statistics and enforcement database permit us to make some rough estimates that provide guidance on the scope of government enforcement.

From those sources, we know that between 2007 and 2016, the DOJ initiated civil non-merger investigations in the range of eight to 33 cases per year. See www.justice.gov/atr/file/788426/download. Of those, a small handful are monopoly investigations (on average, roughly two per year). Those few investigations each year only rarely result in the Department filing a monopoly lawsuit in federal court: between 2007 and 2016, for example, the Department filed only one monopolisation case in court. See id.

The FTC reports its enforcement statistics differently and does not separately distinguish monopoly investigations and lawsuits from other non-merger cases. In general, though, the Commission settles a handful of non-merger cases, including monopoly cases, each year (approximately five settlements annually – see, for example, FTC's 2016 enforcement statistics, at www.ftc.gov/node/1205233), and only goes to federal court or its own in-house administrative court to enforce non-merger claims on rare occasion (once per year on average for the past decade).

56 Have there been any successful actions by private claimants?

As even the most casual observers know, the United States antitrust laws are also vigorously enforced by "private Attorneys' General". These private suits often seek significant lost profits or other monetary damages (which are then trebled under the law), injunctive relief and attorneys' fees and costs.

On average, hundreds of private parties file antitrust cases in federal district courts around the country each year. In 2017, for example, 635 federal court antitrust cases were filed and the vast majority of those cases (604) were brought by private parties. See www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf. Although the precise breakdown of these cases between price fixing, monopolisation and other types of cases, such as price discrimination, varies quite a bit each year, it is clear that the majority of these cases are horizontal price-fixing cases.

It is equally clear, though, that private parties file dozens of monopolisation cases each year (and, in some years, even more) and each year brings news reports of sizeable monopolisation verdicts and settlements (and some verdicts for the defence). Notable cases in recent years include Weyerhaeuser, LePage's, United States Tobacco and Concord Boat.

Appeals

57 Can a company appeal a finding of abuse?

Yes. Of course, the DOJ has no authority to "find" monopolisation. It can only bring a monopolisation case in federal district court to enforce Sherman Act section 2. If, after a lengthy discovery and a trial, the district court agrees with the Department and enters a judgment of monopolisation, the defendant may appeal that decision to a federal Circuit Court of Appeals.

The FTC, in contrast, can bring a monopolisation case under FTC Act section 5 in a "Part 3" administrative hearing. The administrative hearing includes a lengthy discovery process, through which the parties develop the facts, and a trial before an administrative law judge. Unlike a case filed in federal court, though, the outcome of that trial is simply an initial recommendation from the administrative law judge to the Commission that certain facts and legal conclusions be found. The Commission, however, has full authority to review the fact record and the law and reach its own final conclusions. The defendant can appeal any final Commission decision to a federal Circuit Court of Appeals.

58 Which fora have jurisdiction to hear challenges?

A district court judgment in favour of a monopolisation case brought by the DOJ can, like any district court decision, be appealed to the federal Court of Appeals in the Circuit in which the district court sits.

A defendant can appeal an adverse decision by the FTC to any federal Court of Appeals in any Circuit where the defendant resides or carries on business or where it used the anti-competitive practice or conduct at issue. 15 U.S.C. § 45(c).

59 What are the grounds for challenge?

The grounds for an appeal can include challenges to the sufficiency of the evidence supporting the finding of monopoly conduct and challenges to the legal conclusion that the conduct violated the Sherman Act (or, in the case of the FTC, FTC Act section 5) and harmed or likely harmed consumers.

60 How likely are appeals to succeed?

This is a difficult question and is obviously dependent on the facts and law in each case. In general, though, we note that the courts have wrestled with monopoly cases for several decades and continue to struggle with distinguishing a monopolist's vigorous competitive efforts, which are usually lawful, and conduct that crosses the line. Legal precedent regarding monopoly conduct is, thus, often very hazy. For example, although predatory pricing law is fairly well developed and the Supreme Court has articulated fairly clear analytical rules for evaluating predatory selling and buying claims in the Matsushita, Brooke Group and Weyerhaeuser cases, other areas, such as exclusive dealing and bundled pricing, have received sporadic and confused attention from the Supreme

Court and Circuit Courts of Appeals. As a result, there are often legitimate bases to appeal an adverse judgment of monopolisation and appeals have upheld the alleged monopolist's conduct in a range of cases, including Weyerhaeuser, Concord Boat, Menasha and Race Tires.

Topical issues

61 Summarise the main abuse cases of the past year in your jurisdiction.

There was no sea change in monopolisation law in the United States last year. Antitrust law in the United States tends to evolve in small steps, as each of the 12 Courts of Appeals and the dozens of district courts enter opinions in the specific cases in front of them. Only occasionally, does the Supreme Court address antitrust cases (and even less frequently does it address monopoly cases, particularly those brought by the government). In 2018, for example, the Supreme Court did not address any monopolisation cases.

That said, there have recently been a few developments of note. First, the FTC won a $448M verdict against AbbVie Inc. for violating section 2 of the Sherman Act by filing sham patent litigation lawsuits. See Federal Trade Commission v. AbbVie Inc., 329 F. Supp. 3d 98 (E.D. Pa. 2018). Second, the lower courts continue to slowly fill in precedent under the Supreme Court's 2013 ruling in Actavis, which, by the Court's own admission, established a complex and somewhat general framework for evaluating whether an alleged monopoly branded drug manufacturer violates FTC Act section 5 by engaging in a reverse payment settlement of patent litigation. Earlier this year, the FTC reversed an Administrative Law Judge's initial decision and ruled that Impax Laboratories, Inc. engaged in an illegal reverse payment settlement that violated section 5 of the FTC Act. Third, the lower courts continue to grapple with foreclosure analysis in exclusive dealing and bundled pricing cases such as the Kolon case in the Fourth Circuit. Fourth, courts continue to struggle with defining the line between aggressive competition that benefits customers and aggressive competition that harms the competitive process. For example, the Supreme Court issued a ruling last year on whether American Express' "anti-steering" provisions were sufficiently anticompetitive to violate the federal antitrust laws. In a 5-4 decision, the Court affirmed the Second Circuit's decision, holding that plaintiffs failed to meet their burden of proving that Amex's anti-steering provisions had the requisite anticompetitive effects in the relevant market.

There has also been continued enforcement of section 2 by the federal antitrust enforcement agencies, with the FTC taking the lead. For example, the FTC initiated an action in 2017 under section 2 against Questcor Pharmaceuticals, alleging anticompetitive conduct by Questcor to maintain its monopoly in therapeutic adrenocorticotropic hormone products. The FTC and Questcor reached a settlement in which the FTC not only obtained injunctive relief, but also monetary relief in the amount of $100 million. In 2017, the FTC also sued Qualcomm for allegedly tying the sale of its semiconductors to the licensing of its standard-essential patents. In May 2019, the Northern District of California agreed with the FTC, issued an injunction against Qualcomm's practices, and ordered the renegotiation of existing licences. See Federal Trade Commission v. Qualcomm Inc., No. 17-CV-00220-LHK (N.D. Cal. Nov. 6, 2018). Qualcomm has appealed the decision. Finally, earlier this year the FTC filed a complaint against Surescripts alleging that the company employed illegal vertical and horizontal restraints to maintain its monopolies over routing and eligibility electronic prescribing markets. That litigation is ongoing.

62 What is the hot topic in unilateral conduct cases that antitrust lawyers are excited about in your jurisdiction?

Antitrust lawyers on the defence side are usually most excited about cases clarifying the line between lawful and unlawful conduct, as that makes it easier for clients to obtain and rely upon guidance and run their businesses appropriately. In that regard, Supreme Court and Courts of Appeals decisions clarifying the rules governing exclusive dealing, reverse-payment settlements, product hopping and bundled pricing would be particularly welcome to the defence bar.

For the government and private plaintiffs' bar, of course, complexity and haziness often provide some flexibility for creative investigations and lawsuits and may thus be viewed with excitement.

63 Are there any sectors that the competition authority is keeping a close eye on?

Clearly, the pharmaceutical and technology sectors have received substantial attention from the DOJ and the FTC in recent years and we expect the current President's administration to continue that focus, given the widespread focus on concentration and a range of practices in both sectors during the last presidential campaign. The FTC recently created a technology task force to monitor competition in US technology markets. Additionally, Congress recently launched a sweeping antitrust investigation into the largest tech companies, including Google and Facebook. In recent decades, the Justice Department's monopolisation suit against Microsoft was, perhaps, the highest-profile case, but the FTC has conducted significant monopoly investigations of its own, including into conduct by Intel, Google, and Apple, as well as numerous pharmaceutical companies. For example, earlier this year the FTC won a $448M verdict against AbbVie Inc for profits earned from sham patent litigations against generic pharmaceutical companies. In 2017, the Justice Department and the FTC also issued antitrust guidelines for the licensing of intellectual property, suggesting that the DOJ and FTC may scrutinise IP licensing issues more closely and keep a closer eye on cases at the intersection of antitrust and IP.

64 What future developments can we expect?

Substantively, we should expect the courts to clarify areas of monopolisation law that are currently vague and confusing. Notably, the standards for evaluating exclusive dealing remain murky, at best, a circumstance exacerbated by cases finding "partial de facto exclusive dealing" based largely on above-cost price incentives that pass muster under predatory pricing law and which courts should be loath to chill, according to the Supreme Court. Bundled pricing, reverse-payment patent settlements and product hopping are also areas of great uncertainty that we should expect will continue to develop as more and more cases come to a head in courts across the country.

From a sector perspective, we should continue to expect significant focus by both government agencies and by private parties on the technology and pharmaceutical industries.

Joseph Ostoyich

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Joseph Ostoyich is a senior partner of the firm, a member of its executive committee, and prior chair of the firm's litigation department in Washington, DC. He has nearly 30 years of experience representing some of the world's leading companies in bet-the-company price fixing, monopolisation and the full gamut of antitrust litigation in US courts, and in merger and non-merger investigations in industries ranging from high-technology to paper, chemicals, foundry, energy, transportation and agricultural commodities. Joe is currently finishing a trial defending a leading distributor of dental equipment and supplies against a Federal Trade Commission (FTC) lawsuit alleging the company conspired with its rivals to boycott 'buying groups.' He recently received a defence verdict as lead trial counsel in an eight-week bench trial against the FTC on charges that his client conspired to fix prices directly and through an industry association. The Commission's decision to dismiss six of its own counts marked the first time in two decades that the Commission ruled against its own claims, with the case earning Joe and the trial team recognition as a Law360 "Legal Lion" (Feb 2014) and the Behavioral Matter of the Year – Americas award by the Global Competition Review (2015). Additional recent litigation verdicts include receiving a zero-dollar judgment on behalf of a client facing a multibillion dollar monopolisation suit brought by its main rival, summary judgment in a price-fixing case charging his client with participating in a decade-long conspiracy to fix natural gas prices, and the dismissal and denial of class certification in a long-running set of direct and indirect purchaser monopolisation and conspiracy class actions. In all three cases, Joe's cross-examination of the opposing experts led the courts to exclude or disregard their testimony.

Joe also received dismissals on the pleadings in several other antitrust cases, including dismissal of three lawsuits challenging the AT&T-Time Warner merger under the antitrust laws. Joe also represents parties in merger reviews by the Department of Justice, the FTC, the European Commission and government authorities around the world. He recently represented MeadWestvaco Corporation in a worldwide clearance for its $16 billion merger with RockTenn Corporation. He was one of only 385 lawyers nationwide, and only 10 antitrust lawyers, named a 2019 BTI Consulting Group Client Service All-Star, and is regularly recognised as a leading antitrust lawyer in Chambers USA and The Legal 500, rated "Pre-eminent" by Martindale-Hubbell, and named a DC Super Lawyer for Antitrust. He is a member of the Antitrust Council of the US Chamber of Commerce and regularly speaks at industry conferences and client retreats about antitrust law developments. He has written and edited several dozen articles and analyses of the antitrust laws and co-authored a chapter on the law and economics of antitrust damages in a leading treatise.

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Erik Koons is a partner in the antitrust and competition practice of Baker Botts' Washington, DC office. He has more than 20 years of experience representing some of the world's leading companies in bet-the-company antitrust litigations involving the full gamut of competition-related claims, including those alleging price fixing, monopolisation, monopsonisation, "sham" patent litigation, tying and bundling. Many of these litigations have involved massive, nationwide class action claims for both direct and indirect purchaser plaintiffs as well as suits brought by state and federal governments. Erik's class action defence experience involves claims seeking in the hundreds of millions to over $9 billion in alleged damages. Erik's experience has been concentrated in the pharmaceutical, medical device, food, technology, telecom, energy, chemical, manufacturing, transportation and electronics industries. He devotes a substantial amount of his practice representing companies in internal competition-related investigations and in connection with investigations launched by federal antitrust enforcement agencies and states attorneys general. He also regularly counsels corporations on competition-related business matters and designs and implements antitrust compliance programmes for clients across the globe. Erik is a sought-after writer and speaker on a wide range of antitrust topics and has authored competition related articles and publications, including as co-editor of the ABA's forthcoming publication on Obtaining Discovery Abroad, 3rd ed.

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William Lavery is a partner in the antitrust and competition practice of Baker Botts' Washington, DC office. Some of the world's largest companies rely on William's more than a decade of experience for major "bet the company" antitrust litigations, criminal and civil antitrust investigations, and mergers. Clients in industries including pharmaceutical, technology, foundry, chemical, energy, transportation and agriculture seek William's representation in cases alleging a broad range of antitrust violations, including price-fixing, monopolisation, Robinson-Patman violations and sham litigation. William also represents numerous companies in internal investigations and in implementing antitrust compliance programmes. William's leadership roles include having served as the chair of the Antitrust Law Committee for the ABA Young Lawyers Division (2014–2015) and vice-chair of the Committee (2013–2014). He is a sought-after writer and speaker on a wide range of antitrust topics, drafting dozens of articles and publications, as well as a chapter in a leading damages treatise. William has been recognised for his work by The Legal 500 US and Super Lawyers, and named a "Rising Star" by Law360 (2016) as one of the top competition lawyers under 40 in the US.

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The firm's highly ranked competition practice represents many of the world's leading companies in M&A, complex civil antitrust litigation, international cartel matters, and investigations and proceedings by US, European and other international antitrust enforcement agencies. As one of Global Competition Review's top 20 'Global Elite', we are recognised for taking on and winning high-stakes competition challenges around the world. Our transatlantic team of over 60 competition lawyers regularly handles the highest-profile, 'bet the company' matters for our clients across a range of industries, including energy, technology, media, life sciences and healthcare. Members of our team have engaged at the highest levels in the development of European, US and international competition law and policy and we advocate regularly before the Fair Trade Commission, the Department of Justice, state attorneys general, the European Commission and its member states, and other international administrative and regulatory agencies.

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