Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards

of the

ABA Antitrust Law Section

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BACKGROUND

Under the leadership of Jonathan Jacobson, the American Bar Association’s Antitrust Law Section in 2017 created a task force on International Divergence of Dominance Standards (hereafter “Dominance Divergence Task Force” or “Task Force”) in response to a widespread perception that competition law enforcers around the world are following, to some degree, divergent paths in “dominance” cases, at least with respect to certain specific types of conduct. While some differences are inevitable and not necessarily a matter of concern, significantly differing competition rules could create barriers to international commerce and make consistent legal compliance for cross-border sales of products and services increasingly complex. The Section gave the Task Force two years to study the issue and determine the extent to which divergence exists and the reasons for it. The mandate of the Task Force was to research and to understand. This report is descriptive, not prescriptive.

This report focuses primarily upon U.S. and EU approaches to single-firm conduct. In part, this is simply because competition law on single-firm conduct is more developed in those jurisdictions than in others: U.S. and EU approaches are well articulated in a wealth of court decisions and agency determinations that the report draws upon to document areas of convergence and divergence. This also is because those two jurisdictions’ approaches have served as a template for the competition laws and a model for agency practices of many others. But in recognition of the fact that dominance enforcement is increasingly a global phenomenon, and other jurisdictions’ approaches often differ from those of the United States and

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1. The Task Force was chaired by Cynthia Lagdameo, in her personal capacity, and by Hill Wellford, Vinson & Elkins LLP. The members of the Task Force were Alexandre Cordeiro Macadeo, CADE, Brazil; Maria Coppola; Eleanor Fox, NYU School of Law; Joy Fuyuno, Microsoft; Andrew Gavil, Howard University School of Law; Hwang Lee, Korea University School of Law; Timothy Longman; Jan McDavid, Hogan Lovells; Douglas Melamed, Stanford University Law School; James Musgrove, McMillan LLP; Jürgen Schindler, Allen & Overy LLP; Ted Voorhees, Covington & Burling LLP; Gregory Werden; Joshua Wright, Antonin Scalia Law School. The chairs express special thanks to Task Force members Greg Werden and Maria Coppola, and to the Task Force’s young lawyer representatives Tal Elmatad of Axinn Veltrop & Harkrider LLP and Kristin Sanford of Weil, Gotshal & Manges LLP, for their substantial drafting and production assistance. The views expressed herein should not be attributed to institutions or clients with which its chairs and members are associated.
the European Union, the Report also discusses jurisdictions in Asia and contains country-specific sections on Australia, Brazil, China, India, Israel, Mexico, and South Africa.

The Task Force benefitted from drafting assistance by Section members and other volunteers. In the course of its work, the Task Force reviewed cases and commentary on single-firm conduct and drew from the expertise of its members and broader ABA membership. The Task Force also gathered input by holding a series of panel discussions and workshops, including conducting panels at the ABA Antitrust Law Section’s 2018 and 2019 Spring Meetings, and three seminars (Brussels, Singapore, Brasilia) as part of the Section’s Global Seminar Series.

The report is a consensus document. The Task Force members hold a diverse range of political, ideological, and professional views, and preparation of this report involved vibrant and spirited debate. In keeping with the strong philosophy favoring action by consensus that animates Section reports and publications, Task Force members worked hard to accommodate one another’s perspectives, and some findings and conclusions offered herein would not have been written in the same way by any individual member writing alone.

2. Alden Abbott; Anu Bradford, Columbia Law School; Thomas J. Collin, Thompson Hine LLP; Craig Falls, Dechert; Howard Fogt, Foley & Lardner LLP; Axel Gutermuth, Arnold & Porter Kaye Scholer LLP; Renata Hesse, Sullivan & Cromwell LLP; Elinor Hoffmann, Office of the New York State Attorney General; Matthew Kent, Alston & Bird; James Keyte, The Fordham Competition Law Institute and The Brattle Group; Paul Lugard, Baker Botts LLP; Renato Nazzini, Kings College London; Andreas Reindl, Van Bael & Bellis; Swarnim Shrivastava, George Mason University; Julie Soloway, Blakes, Cassels & Graydon LLP; and Thomas Bohnett, Morgan Kelley, Evan Miller, Brian Schnapp, Lindsey Vaala, and Ryan Will, Vinson & Elkins LLP.

3. As an incentive for greater participation and to ensure candor, the ABA conducted the three seminars via Chatham House rules, meaning that in-seminar statements cannot be attributed to speakers, but the chairs of each event collected the views of participants, which are summarized in an Annex.
EXECUTIVE SUMMARY

The ABA Antitrust Law Section in 2017 created a task force on International Divergence on Dominance Standards in response to a widespread perception that competition law enforcers around the world follow divergent approaches to dominance cases, at least with respect to certain types of conduct. The Task Force found that the perception is accurate: dominance enforcement and standards are, in fact, different in significant ways across jurisdictions. These differences exist not only between the United States and the European Union—the jurisdictions that are a main focus of this report—but also in comparison to enforcement currents elsewhere. But these differences should not be exaggerated, and they often do not lead to different outcomes. This Report tells a complex story of differences, similarities, and the reasons that enforcers likely have evolved toward current policies.

The report is divided into eight chapters, which this Executive Summary discusses in turn.

Chapter I: Introduction

In part the genesis of the Report was recent headlines made by cases involving dominance enforcement that appeared to put divergent enforcement approaches on prominent display. These cases included European Commission (EC) decisions against Microsoft and Google that differ in key respects from cases or decisions by the U.S. Federal Trade Commission (FTC) and U.S. Department of Justice (DOJ). U.S. and EU officials have acknowledged some differences in their approaches to enforcement against single-firm conduct. The prominence of these and other matters have caused the differences to garner attention beyond the antitrust community, with the mainstream press asking whether the United States and the European Union differ in their enforcement against dominant firms. The Task Force finds that there are (and, more clearly, have been) material differences, although some are subtle, and divergent outcomes are infrequent.

The Task Force perceives a common U.S.–EU mainstream with some divergent currents. Asian, African, Latin American, and Australian enforcers are increasingly active in dominance enforcement, and their practices both follow and depart from this mainstream in interesting ways. The Task Force observed a complex environment in which policy and enforcement regarding single-firm conduct continues to evolve and is debated on a global scale.
The goal of this report is to identify differences in dominance enforcement, understand their causes, discuss where alignment exists or convergence is occurring, and lay a foundation for future work by academics, business executives, government officials, and legal practitioners. The Report is descriptive, not prescriptive.

Chapter II: Areas of Convergence

This Report is not the first to examine divergence and alignment in dominance standards. The Organisation for Economic Co-operation and Development (OECD) and International Competition Network (ICN), among others, have collected information on the approaches to dominance enforcement of numerous jurisdictions. These organizations also have advanced the law by publishing recommended best practices and identifying areas of agreement.

Areas of agreement include:

- The threshold requirement of dominance filters out instances in which conduct would not harm competition.
- Dominance is the ability to maintain or strengthen a position of substantial market power through practices that harm the competitive process.
- At most one firm in any relevant market can possess dominance.
- Conduct is anticompetitive only when it harms the competitive process and is expected to harm consumers.
- Dominance enforcement should not insulate firms from aggressive competition, including from dominant firms.

Thus, jurisdictions generally employ what has come to be called a “power + conduct” paradigm, in which they apply their single-firm prohibitions only to dominant firms, and only when those firms engage in conduct found to be exclusionary.

Chapter III: Understanding the Contextual Roots of Divergence

European and U.S. approaches to competition law have evolved in the contexts of their philosophical, legal, and more general histories. Antitrust law in the United States was a response to the rise of large and powerful industrial companies at a time of economic growth and rising living standards. It was never a means for promoting market integration because the U.S. Constitution implemented a national economic policy of market integration long before enactment of antitrust laws. In addition, there was no need for U.S. antitrust law to address state-sponsored or formerly state-sponsored dominant companies.
European competition law, by contrast, arose as one aspect of a plan to lower national, linguistic, and cultural borders, and to deal with state-sponsored or formerly state-sponsored dominant companies. European competition law also was part of a post-World War II concerted effort to recover the economies from the devastation of war and to guard against circumstances that could lead to a future war. Hence, competition law in much of Europe was part of a move from more extensive government control over the economy to far less involvement.

Although views have shifted over the decades about the proper degree of government influence in the economy, the United States has tended to place a great deal of faith in market mechanisms to achieve desired outcomes and far less in government regulation. Europeans tend to favor a larger role for government, and the history of European competition law enforcement reflects that philosophy.

The key European unilateral conduct law, Article 102 of the Treaty on the Functioning of the European Union (TFEU), is both more specific and broader in most respects than its U.S. equivalent, Section 2 of the Sherman Act (Section 2). The EC’s competition enforcer, the Directorate General for Competition, investigates cases and issues binding enforcement decisions, which become automatically final unless defendants appeal to courts, at which point court review occurs under a standard that is deferential to the agency on complex economic matters. U.S. enforcers, by contrast, seek relief from generalist federal court judges, which have applied increasingly demanding standards of proof. These factors can influence the number and type of cases U.S. enforcers bring.

Private enforcement also is important in the United States. Private plaintiffs have been able to seek treble damages since the first days of the antitrust laws, and the prospect of a large damages award is a powerful incentive for bringing suit. Some of these cases are not motivated by a desire to promote competition, which has led U.S. courts to develop strong safeguards against suits that are not consistent with the promotion of competition, and several of these safeguards also are applied in government actions. In Europe, competition damages actions are a relatively recent phenomenon, so competition jurisprudence has developed with little perceived need to guard against improperly motivated enforcement. As a result, enforcers in Europe do not face the headwinds that slow, or from another perspective, discipline, enforcement in the United States.
Chapter IV: Analytic Divergence between the United States and the European Union

The general definition of what it takes to be “dominant” is quite similar between the United States and the European Union. The market shares necessary for a dominance finding in Europe once were decidedly lower than those associated with monopoly cases in the United States, but both the United States and EC have cited market shares at or above 70 percent in more recent cases. Divergence in dominance findings nevertheless occasionally can occur because of differences in market definition or procedures.

The nature and quantum of necessary harm appears to be an area of transatlantic divergence. In the United States, mere harm to rivals is not enough; exclusionary conduct also must be reasonably capable of contributing materially to a defendant’s maintenance of monopoly power. Article 102 analysis is broadly similar to that under Section 2, but the materiality bar appears to be lower; for example, the Court of Justice has indicated that adverse effects need not be serious or appreciable. The exact nature of the effects that European enforcers must show is currently the subject of academic discussion and litigation, particularly in view of the Intel Corp. v. European Commission decision.

Chapter V: Illustrative Examples of Divergence

This Chapter examines the U.S. and EU approaches in real-world cases in five areas: refusals to deal and margin squeeze, exclusive dealing, loyalty discounts, leveraging (including technical tying), and predatory pricing.

The general rule in both Europe and the United States is that even a monopolist may refuse to deal with any other party. The difference is that the United States makes fewer exceptions to this general rule than does Europe. U.S. law makes an exception when the refusal reflects the dominant firm’s willingness to sacrifice near-term profits in favor of longer-term monopoly gains. The European approach focuses more on the refusal’s market impact than on its rationale; the EU test requires that the refusal involve an “indispensable” input and result in the elimination of all effective competition downstream. A dominant firm is entitled to attempt to justify the refusal on the grounds of protecting its own incentive to innovate but it bears the burden of proof.

Notable EU refusal-to-deal cases have involved intellectual property. While an unconditional, unilateral refusal to license intellectual property, without more, has never been found to be a violation of Section 2, such acts have been found to violate Article 102. EU law can impose a duty to
deal when a refusal prevents the introduction of a new product for which there is potential consumer demand.

A contrast exists regarding the related conduct termed “margin squeeze,” the practice of a vertically integrated firm charging an input price to a nonintegrated rival that makes it impossible (or nearly so) for the rival to compete in the downstream market. In 2009, the Supreme Court in Pacific Bell Telephone Company v. linkLine declared that margin squeeze cannot be a free-standing violation of Section 2, whereas in 2010 the Court of Justice of the European Union recognized margin squeeze as an abuse of dominance in its own right in Deutsche Telekom AG v. Commission. Several additional cases in each jurisdiction have followed, leaving the divergence intact.

Exclusive dealing cases in the European Union and United States diverge with respect to the required showing of effects. The focus of U.S. cases is on the degree of foreclosure and impact on competition as a whole. Europe historically applied more bright-line prohibitions on exclusive dealing by dominant undertakings regardless of magnitude or impact of foreclosure.

Closely related to exclusive dealing arrangements are loyalty discounts. Loyalty discounts are not related to transaction size, but rather to the degree to which a customer concentrates its purchases, which makes such discounts available to customers of all sizes. Loyalty discounts reduce the price every customer pays for incremental units below the price paid from inframarginal units. Some early U.S. cases evaluated loyalty discounts similarly to predatory pricing but more recent cases have evaluated them similarly to exclusive dealing. The U.S. courts also demand proof that competition has been materially foreclosed (or is likely to be foreclosed, if the conduct is at an early stage).

European law on loyalty rebates is somewhat unsettled: early decisions presumed that loyalty rebates were capable of exclusionary effects, whereas more recent decisions such as Post Danmark A/S v. Konkurrencerådet used analytical tools to assess impact but still declined to apply a materiality requirement. The Court of Justice for the European Union’s 2017 Intel decision clarifies the role of effects in an analysis of rebate schemes. Intel holds that a dominant firm can overcome the presumption of illegality with substantiated arguments and evidence that the conduct was not capable of restricting competition under the particular circumstances of the case, including evidence of the rebates’ market coverage. Elements of the Intel case continue to be litigated as of this writing, so it is unclear the degree to which there continues to be a
difference between the United States and European Union as to the showing of impact necessary for finding a violation.

Leveraging, including technical tying, is an area of substantial difference. In the United States, the Supreme Court’s Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP decision held that a leveraging theory states a claim under Section 2 only if there is at least a dangerous probability of monopolizing the second market. EU courts hold that a dominant firm commits an abuse in violation of Article 102 by engaging in conduct merely capable of restricting competition in a related market by causing the exit of an as efficient competitor, without requiring a likelihood of achieving dominance in that market. A violation of Section 2 requires a much greater impact in the second market because it is framed differently than Article 102.

Technological (or technical) tying is a type of leveraging theory in which a company designs (often, redesigns) some tying product so that it can be used only with its complementary tied product. The United States and European Union have approached technological tying with different levels of confidence about antitrust intervention. Courts applying Section 2 are very skeptical about claims that competition has been harmed by a dominant firm’s product design choices or that courts can predict which choices best serve consumer welfare; if a dominant firm’s product design change is an improvement, its design-related conduct has been tolerated by U.S. antitrust laws. Under Article 102, technological tying is treated much the same as contractual tying.

The United States and the European Union diverge at least in form on predatory pricing. Both require some showing of prices below a measure of costs, and both consider similar factors. Only the United States requires a specific showing of the possibility of recoupment—in fact, the United States requires a likelihood—but factors important to such a showing (e.g., high barriers to entry) are considered by both. EU case law arguably infers the possibility of recoupment from the fact of dominance. The U.S. approach can be seen to impose a stronger impact requirement than that of Europe, and U.S. courts are very concerned about depriving consumers of the benefits of low prices in the near term. European courts view pricing below average variable costs as presumptively exclusionary. That said, the EC’s Priorities Paper notes that, if an equally efficient competitor “can compete effectively with the pricing conduct” in question, the EC will “infer that the dominant undertaking’s pricing conduct is not likely to have an adverse impact on effective competition.”
Chapter VI: Excessive Pricing and Abuse of Superior Bargaining Position

Exploitative abuse—e.g., unilaterally charging a price that is allegedly too high—is not a recognized concept in the United States. Outside the United States, exploitative abuse nearly always is a recognized concept, although competition authorities have been cautious in its application. In Europe, the exploitative abuse of excessive pricing can be established through a comparison of the prices charged by the dominant firm in a given EU member state with prices in other EU member states for the same product or service. A recent EU submission to the OECD is noteworthy in that it outlines factors that EU competition authorities are likely to account for when determining whether intervention against excessive pricing is warranted, including that enforcement may be justified where market forces do not bring prices back to normal levels within a reasonable time period. The submission recognizes practical difficulties associated with, among other things, determining what prices should be considered normal. Competition agencies in Europe have brought relatively few cases based solely on excessive pricing but recent member state cases about pharmaceutical pricing appear to signal a wave of enforcement in that area in the European Union.

Asian enforcers have shown greater interest in excessive pricing cases, in part because Asian competition laws tend to be based on fairness rather than economic efficiency, and competition law in Asia addresses a broader range of issues than in the United States or Europe. Asian enforcement, however, is not monolithic. In the prominent recent example of the Qualcomm cases, the authorities in China, Korea, Japan, and Taiwan showed notable differences in addressing similar issues. China tends to be more amenable to considering excessive pricing claims, while Japan, Korea, and Taiwan seem to be more cautious.

China’s approach is significantly influenced by the European perspective, and despite explicit statutory provisions enabling enforcement against unfair pricing practices, pricing abuse cases have not been common. The most active Chinese enforcement in this area has involved standard essential patents and the pharmaceutical sector.

Korea has enforced its statutory provision against excessive pricing on a stand-alone basis only twice since its enactment in 1980, and the Korea Fair Trade Commission (KFTC) has stated that price regulation by government “should be limited to industries in which natural monopoly is formed or legal (regulatory) barriers to the market are high.” Based on the limited cases to date, it appears that the KFTC may try to address excessive
pricing through enforcement of traditional antitrust claims rather than intervening directly.

No specific provision in Japan’s competition law prohibits excessive pricing. Excessive pricing could constitute a type of private monopolization. The Japan Fair Trade Commission has never brought an excessive pricing case but has shown interest in excessive pricing issues regarding patent licensing.

Taiwan’s competition law prohibits dominant companies from improperly setting, maintaining or changing the prices for goods or the remuneration for services. The Taiwan Fair Trade Commission has brought a few cases, often focusing on standard essential patents. Its success in court has been mixed, and more recent cases have involved settlements.

Another way some competition agencies regulate single-firm conduct is to prohibit abuse of superior bargaining position (ASBP). In countries actively enforcing ASBP laws, such as Bulgaria, Germany, Japan, and Korea, ASBP is a competition law violation. In other jurisdictions, the concept of superior bargaining position is reflected in the criteria for assessing dominance; for example, in China, the extent of reliance by other undertakings on the undertaking in question is a relevant factor in determining whether the undertaking is dominant.

The elements of ASBP diverge sharply from those of abuse of dominance or monopolization. A key distinction is that superior bargaining position is not the same as dominance in the traditional sense; several large firms in the same market, independently, could in theory violate ASBP prohibitions at the same time. Another important difference is that ASBP enforcement often explicitly reflects the intention to regulate unfair, but not necessarily anticompetitive, conduct. The common characteristics of superior bargaining position generally are (1) a contractual or pre-contractual transacting relationship between the parties (typically a vertical distribution relationship); and (2) one party’s commercial dependence on the other party, which places the latter in a superior position.

In general, there is no need for an enforcer to prove an actual negative effect on competition to support an ASBP claim. Enforcement to date can be classified into a few categories: (1) unfair contractual terms (including changing of terms); (2) demands that are not consistent with industry norms and fall outside the contract; and (3) cases that look like traditional abuse of dominance or monopolization, but requisite elements (e.g., dominance) may not be satisfied. The first two categories seem to reflect
a philosophy that ensuring fairness in business dealings is part of the mandate of a competition agency.

Chapter VII: International Landscape

The Report surveys how competition law has expanded rapidly throughout the world since the end of World War II and has become a normal feature of economies and legal systems. Organizations such as the OECD and the ICN have helped shape the development of competition law, and U.S. and European efforts to spread it have helped “push” this development, but most of the enthusiasm for competition law has come from the “pull” of developing nations’ own interest in creating competition regimes. There is a recognizable substantive mainstream developed from U.S. and EU experience (which, as mentioned, is far more aligned than divergent) and also a noticeable trend to favor a European-style procedural model—somewhat regulatory in nature—rather than the enforcement model of the United States, which requires an agency to litigate in the first instance before an independent court.

Chapter VIII: Dominance Enforcement in Seven Selected Countries

The Report concludes with brief notes on single-firm conduct enforcement in seven countries: Australia, Brazil, China, India, Israel, Mexico, and South Africa.
I. INTRODUCTION

The past two decades have seen competition authorities around the globe achieve alignment with respect to many aspects of evaluating and defining anticompetitive single-firm conduct. However, differences remain. Of officials from competition authorities in the United States and Europe have acknowledged that they pursue divergent enforcement approaches to violations of the law involving single-firm conduct by dominant firms—known as “abuse of dominance” in Europe and most of the rest of the world. In 2016 FTC Commissioner Maureen K. Ohlhausen observed that: “The abuse-of-dominance standard in Europe is stricter and reaches further than American rules on exclusionary conduct.” In several interviews and in later remarks at the 2017 ABA Section of Antitrust Spring Meeting, EU Competition Commissioner Margrethe Vestager acknowledged differences with the U.S. approach. The focus of the Task Force was the current practices of each jurisdiction.

4. Indeed, divergent views on appropriate standards sometimes exist even within a single jurisdiction; for example, there are many calls to change current enforcement policy in the United States to a more interventionist approach. See, e.g., Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Jonathan B. Baker, The Antitrust Paradigm: Restoring a Competitive Economy (2019); Lina A. Khan, The New Brandeis Movement: America’s Antimonopoly Debate, 9 J. Eur. Competition L. & Practice 131, 131 (2018). And some European commentators would prefer an enforcement approach that is less interventionist and more closely resembles that of the United States. For example, Alfonso Lamadrid and Pablo Ibáñez Colomo, who maintain the blog Chillin’ Competition, https://chillingcompetition.com, The focus of the Task Force was the current practices of each jurisdiction.

5. In the United States, violations of § 2 of the Sherman Act comprise three separate offenses: attempted monopolization, monopolization, and monopoly maintenance. For the most part this Report focuses on monopoly maintenance.

6. See, e.g., Case C-413/14 P, Intel Corp. v. Comm’n, ECLI:EU:C:2017:632, ¶ 42 (Sept. 6, 2017) (“Article 102 TFEU prohibits the abuse of a dominant position ‘within the internal market or in a substantial part of it.’”) (currently on remand to the General Court).


The Task Force was asked to explore the differences in analysis of conduct by firms with positions of dominance, attempt to describe them, and, in so doing, discuss also where alignment exists, differences may be overstated, or convergence is occurring. This Report takes a combination of approaches. By examining the issues through multiple lenses, this Report tells the story, or at least a story, about differing outcomes under comparable circumstances, differing treatment of specific practices, and differing experience, institutions, and philosophies.

In addition to attempting to document and detail specific differences, the Report makes some attempts to explain their origins. The Report seeks to facilitate discussions among policymakers so that they may better understand their differences and consider whether changes to their current practices are appropriate. Those establishing or maintaining legal rules—judges, administrators, advocates, and politicians—should understand the reasons, both immediate and underlying, and both express and implicit, for any differences they might seek to narrow.

It is important to note that policy and enforcement in this space have been fluid and continue to evolve. Competition agencies are informed and influenced by modern economic thinking, which itself continues to evolve, and various iterations of an effects test seem to be on the rise in a growing number of jurisdictions and across a widening range of business practices. These developments appear likely to be a continuing force for incremental convergence. But, still, there remain notable and, in some instances, consequential differences, and our goal is to identify them and provide greater understanding of their causes and consequences. With this Report, the Section hopes to bring this discussion further into the open and make it better informed, so as to stimulate additional work on the subject in academic and public policy spheres as well as among legal practitioners and the business community.

A. Genesis of the Report

Cases involving dominance enforcement have made headlines, putting divergence on public display. In June 2017, the EC fined Google €2.42 billion for abuse of dominance in general search through the more favorable treatment of its own downstream comparison shopping service in its general search results. The EC concluded that Google had “stifled competition on the merits in comparison shopping markets,” and required
Google to ensure “equal treatment [as between] rival comparison shopping services and its own service.”9 To comply with the decision, Google introduced an auction mechanism by which third-party comparison shopping services can bid for placement in Google’s European “shopping unit” results.10 The FTC had investigated the same conduct but closed its investigation without challenging Google’s conduct. The FTC Commissioners issued a closing statement, explaining: “Challenging Google’s product design decisions in this case would require the [FTC]—or a court—to second-guess a firm’s product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence.”11 Various other enforcers have reviewed Google’s conduct in search and related services, with varying analyses and outcomes.12


10. The shopping unit results were advertisements prominently displaying a product picture, product name, price, and vendor name, as opposed to the search results’ text-only hyperlinks. E.g., search for the query “Sony camera,” performed on www.google.fr (July 31, 2019).


12. The investigations of Google’s conduct reflect differences around the globe. For example, starting in 2013, the Canadian Competition Bureau investigated Google’s conduct in search and related services and closed the investigation in 2016, finding insufficient evidence that Google’s conduct was anticompetitive (it did accept voluntary commitments relating to Google’s exclusive advertising contracts in its AdWords service). Competition Bureau Statement Regarding its Investigation into Alleged Anti-competitive Conduct by Google (Apr. 19, 2016), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html. The Brazilian competition enforcer, known in English by the initials CADE, reached a similar result in July 2019. See Google Inc. v Google Brazil Internet Ltda, Processo no. 0812.010483/2011-94 (Conselho Administrativo de Defesa Econômica, July 1, 2019). But in 2018, the Competition Commission of India found that Google abused its dominant positions by engaging in
A decade earlier, in another high-profile technology case, both the U.S. and the EU courts found Microsoft liable for abusing its dominance in PC operating systems, but the EC also found liability and imposed a remedy as to Microsoft’s bundling of a media player, conduct that DOJ did not challenge. When in 2007 the European Court of First Instance upheld the EC’s *Microsoft Corp. v. Commission* decision and remedy, the head of the DOJ’s Antitrust Division stated that: “We are . . . concerned that the standard applied to unilateral conduct by the European Court of First Instance, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition.”

Different outcomes can result from different facts; however, in the foregoing examples, Google and Microsoft had global business models and similar conduct in each jurisdiction, and in any event, the authorities did not cite factual differences in their opinions that would explain the different results. Moreover, divergence has not been limited to the technology sector, or to enforcement against American companies.

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search bias in connection with Universal Results and with Google Flights, imposing certain restrictive conditions in some of its agreements for syndicated search and advertising services. *In re Matrimony.com & Consumer Unity & Trust Soc’y v. Google LLC* (C. Nos. 07 & 30 of 2012).


15. See Chapter V.D. for a discussion of *Microsoft* case.


Although divergent outcomes are more than occasional, in a sense, they are exceptional. In many ways, international enforcers’ approach to dominance has become far more similar than different—as discussed in Chapter II—and many parallel dominance investigations against global firms have reached largely the same results.19

B. Structure of the Report

The remainder of the Report is structured as follows: Chapter II discusses the areas of convergence at a multilateral level and between the United States and the European Union. Chapter III examines the roots of divergence in history, philosophy, legal structure, and institutions. Chapter IV contrasts the analytical approaches of the United States and European Union at a high level of abstraction, and Chapter V contrasts their treatment for several specific categories of conduct. Chapter VI addresses abuse of a superior bargaining position and excessive pricing, mainly as it has developed in Asia.

Chapter VII sets out the international landscape, including the growth of competition enforcement, and observes the developing approaches to dominance enforcement in outside the United States and European Union. These jurisdictions have published fewer cases and non-case materials than the United States and European Union but they have increasingly vigorous enforcement authorities. Through their cases and their participation in international efforts such as those of the ICN, these jurisdictions’ approaches are taking shape in large part as recognizable developments of what might be termed the U.S.-EU mainstream, but with apparent departures from U.S.-EU practices.

Chapter VIII concludes the Report with a brief review of dominance enforcement in seven selected countries.

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Enforcement Is So Difficult to Bridge, Antitrust, Fall 2018 113. Note the Fox and Marcos articles were published before a major decision by the Court of Justice in Intel, which could point towards a more effects-based economic approach. See discussion of Intel in Chapter V.C.

19. In high-profile matters involving Intel, Rambus, and Qualcomm, the assessments and enforcement actions by the EC and FTC were very similar. In the case of Qualcomm, the KFTC also acted similarly. The FTC’s decision against Rambus was reversed on appeal. Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).
II. AREAS OF CONVERGENCE

International organizations, competition authorities, academics, and other commentators have made efforts to review dominance standards around the world. This Report does not cite all such efforts but several bear mention.

In 1996, the OECD Competition Committee conducted a roundtable on abuse of dominance. The background note concluded that the substantive differences between United States and EU law “suggest that attempts to attain a unified international approach to single-firm conduct is likely to be at best difficult and arguably not clearly necessary.” To promote effective enforcement of competition laws in the area of abuse of dominance and monopolization, the OECD Competition Committee subsequently held many additional roundtables and published the proceedings.

In 2006, the ICN formed the Unilateral Conduct Working Group (UCWG) to promote convergence and sound enforcement of laws governing unilateral conduct. In the years since, the Working Group has produced a significant volume of detailed work, including comparative reports on ICN member practices. The Working Group also has developed international best practices—in ICN parlance “recommended practices”—on the assessment of dominance, predatory pricing analysis, and the treatment of state-owned enterprises. In 2010, the UCWG began creating a workbook on the analysis of unilateral conduct, which now addresses the objectives of unilateral conduct laws and the analytical framework for assessing unilateral conduct, dominance, exclusive dealing, predatory pricing, and tying/bundling. The workbook is a practical manual for

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21. Id. at 48.
23. These are available on the UCWG page on the ICN website, https://www.internationalcompetitionnetwork.org/working-groups/unilateral-conduct/highlighted-work/.
agency staff to use when investigating unilateral conduct and analyzing its competitive effects in accordance with international best practices.  

The UCWG work product demonstrates international consensus on many issues relating to single-firm conduct law and policy. Critically, the most recent workbook chapter reflects broader and deeper consensus than earlier chapters because further convergence occurred in recent years. The Task Force finds far more similarity than difference between the current U.S. and EU approaches to competition enforcement against dominant firm behavior. To a large extent, convergence is reflected not only in agency and court enforcement actions but also frequent consensus among competition agencies not to act against conduct over which many have jurisdiction. It is now reasonable to treat recent U.S. and EU enforcement against dominant firm behavior as somewhat of a singular “modern mainstream” approach, although with some important divergent currents. 

The ICN’s work has indicated many significant points of agreement. Among them are that all jurisdictions “prohibit a firm possessing dominance from engaging in exclusionary conduct.” The threshold requirement of dominance “serves as a filter for intervention against specific anticompetitive conduct” to exclude instances in which the “conduct either cannot be entered into by a nondominant firm, or would not harm competition if exercised by such a firm.” Further, the dominance requirement does not focus on a firm’s ability to raise price but rather on the distinct ability to maintain or strengthen the position of dominance/substantial market power through the adoption of practices that harm the competitive process. While jurisdictions have not reached consensus on how high to set the dominance bar, they are agreed that “[a]
most one firm in any relevant market can possess dominance/substantial market power.”

There is also substantial convergence on the substance of the law: “[c]onduct is ‘anticompetitive’ under competition law when it adversely affects competition, that is, when it harms the competitive process, and is expected, therefore, to harm consumers”

“[a]nticompetitive conduct is ‘exclusionary’ under competition law when its anticompetitive effect is achieved by impairing the abilities of actual or potential rivals to compete or by depriving the rivals of opportunities to compete”

“[c]ompetition law does not exist to insulate firms from competition. . . . A practice is not considered exclusionary when it causes rivals to falter only because they are inept”

“[a]ctions that advance a firm’s interests in no way other than by reducing its costs or better serving its customers are [lawful] competition on the merits.”

At a basic level, an important similarity between the United States and European Union is the use of a “power + conduct” paradigm. Although there are differences in standards, both jurisdictions apply their single-firm prohibitions to dominant firms that engage in “exclusionary” conduct. This power + conduct framework, has proven to be a unifying one, employed by many jurisdictions. And in determining whether conduct is exclusionary, the focus is on effect on the competitive process.

While there has been variation over time, increasingly, competition authorities apply an effects test, which means a requirement that the conduct harm or be likely to harm competition in the market as a whole.

The Task Force concurs in the view of one of its members that: “The U.S. antitrust law on monopolization and the EU competition law on abuse of dominance share much in common.”

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29. Id. at 11 (the possibility of collective dominance, recognized by some jurisdictions, is an exception).
30. Id. at 20.
31. Id. at 24.
32. Id. at 25. The conduct most directly aimed at sabotaging the competitive process is cartel activity, which is universally condemned under competition law. As documented by this Report, jurisdictions are not agreed on when single-firm conduct by dominant firms should be viewed as sabotaging the competitive process, but they do agree that such conduct should be found in violation of competition law only when it is viewed as sabotaging the competitive process.
33. Id. at 26.
34. As discussed in § IV.B.2, the effects required in the European Union are less substantial than those required in the United States.
35. Prepared Statement of Eleanor M. Fox, U.S. Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer
In addition, all antitrust regimes are informed and influenced by modern economic thinking. Many competition agencies have established a chief economist position with a staff of economists who work with case teams. All agencies operate under a common set of basic microeconomic principles, share a common parlance through the language of economics, and have access to the same extensive economic literature on competition issues. Nevertheless, it should be observed that building on a common knowledge base does not ensure consistent policies or enforcement decisions. Competition enforcement and adjudication draw not just on scientific knowledge, but also on beliefs and assumptions that fill knowledge gaps. In this regard, U.S. antitrust jurisprudence, more than that of the European Union, has been strongly influenced by the anti-interventionist views that became a major current in U.S. antitrust thinking roughly four decades ago.  

III. UNDERSTANDING THE CONTEXTUAL ROOTS OF DIVERGENCE

A. Historical and Philosophical Differences

1. Economic History

   In the United States, the Sherman Act of 1890 was enacted as a period of extreme laissez faire by the federal government was gradually ending. At the time, the Constitution was interpreted to define a very narrow scope for federal regulation of businesses or the economy generally. Over the


36. Professor Fox commented that the European Union “never adopted the Chicago School premises. It does not assume markets work well. It does not admonish: Trust the market—especially not when the market is concentrated and dominated by a single firm. It does not presume that antitrust intervention is likely to mess up the market and chill competition and innovation.” Id. at 6.

next century, judicial interpretations broadened the scope for federal regulation, and competition law changed course many times. Similar to Europe, competition law in the United States was influenced in part by prevailing views on the government’s role in promoting and safeguarding a unified market. The U.S. Constitution laid the foundation for the development of a fully integrated market, and the Supreme Court’s dormant Commerce Clause jurisprudence has nullified efforts by the States to block interstate commerce or discriminate against it. Consequently, U.S. antitrust law has taken for granted a large, unified internal market, and was not intended to specifically address or protect against state-sponsored dominance.

Competition law came to Europe as part of a treaty designed to create a unified European market. At the end of World War II in Europe, “a critical core of European nations resolved to create a new structure of governance so as never to have a war again.” The treaty establishing the European Economic Community (EEC) of 1957 (subsequently termed the EC Treaty and now the TFEU) was designed to foster peace among the nations and peoples of Europe by creating interdependences—through the lifting of economic barriers—and one single market. While the treaty depended on the concept of a unified economic community, each nation’s borders were economic frontiers, and these frontiers were barriers to trade. Hence, at a time when the U.S. Constitution safeguarded a unified market, economic nationalism divided Europe. The political economy of

38. See, e.g., HP Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949) (“This Court consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state . . . .”); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (“The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”).

39. In sharp contrast to the competition laws of most jurisdictions, U.S. antitrust law allows the states to replace competition with regulation of government monopoly. The Supreme Court explained that, “because ‘nothing in the language of the Sherman Act . . . or in its history’ suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints ‘as an act of government.’” FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 224 (2013) (quoting Parker v. Brown, 317 U.S. 341, 350, 352 (1943)).


41. See supra note 38.
the nations varied: some had statist regimes, with a plethora of state-owned enterprises; most had significant degrees of government regulation. The four freedoms of movement in the Treaty—goods, services, capital and people—were designed to eliminate state barriers to trade, investment, and the establishment of business. And their underlying purpose was to allow a war-torn population to benefit from a common market that provided more and better products at affordable prices. Competition policy was then tasked with ensuring that business actors would not erect or re-erect barriers, exercise special privileges, or otherwise abuse their power. Europe’s competition laws expressly aim to solidify an integrated European market by prohibiting dominant conduct seen to re-erect barriers to trade. Thus, EU competition law was designed to open markets and create an internal market by prohibiting conduct that restrained sales across national boundaries and conduct of former state monopolies within their traditional spheres of dominance.

2. Philosophical Differences

Competition policies in the United States and Europe reflect profound differences between the jurisdictions in the faith placed in market mechanisms to serve consumer interests. In the United States, competition law is influenced by a strong faith in market mechanisms and the desire to guard against erroneous government intervention that itself could stifle competition. The Supreme Court first observed this core belief in 1951 when it declared that: “The heart of our national economic policy long has been faith in the value of competition.”\(^42\) A few years later the Court explained that the Sherman Act “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”\(^43\)

This faith—indeed, enthusiasm for market mechanisms—is one underlying reason why U.S. antitrust law eschews enforcement against mere monopoly pricing. The Supreme Court declared that: “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic

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growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. Because the U.S. view is that seemingly imperfect market outcomes (such as monopoly pricing) may nonetheless “be part of a longer process toward efficiency,” the U.S. view is that “to condemn pricing alone is to bypass the competitive process altogether.”

U.S. faith in market mechanisms is predicated on the belief, dating to the late 19th Century, that even monopolies in almost all circumstances will face competition from new entrants, including innovative entry that can topple even the most entrenched monopolies. Since 1890 policy in the United States has not been complete laissez faire, but rather carefully targeted antitrust intervention protecting market forces rather than supplanting them.

EU competition law was designed with a firm commitment to markets, including the creation of an internal market. The Treaty and its drafters recognized that EU level intervention would be necessary for the internal market to develop, and that competition law intervention was necessary to discipline both state and private actions. Compared to the United States, the enforcement culture in the European Union is “markedly regulatory” in nature and “much more prepared than the American one to trust the State as a deus ex machina.” Europe “does not presume that antitrust intervention is likely to mess up the market and chill competition and innovation” because it believes that “lowering barriers to entry and keeping a clear path for challengers is likely to make the market more dynamic and thus serve consumers better.”

While enforcement of Article 44


Competition law takes a special place at the heart of EU law, enshrined in the TFEU and thus part of primary EU law. As such, the competition rules in the Treaty are beyond the reach of the EU institutions, whether they are acting in a legislative or judicial function.

GIULIANO AMATO, ANTITRUST AND THE BOUNDS OF POWER 98, 114 (1997) (the author is a former head of the Italian competition authority).

Statement of Eleanor M. Fox, supra note 35.
initially was based on a formalistic approach to single-firm conduct, over time, the EC cases finding an abuse of dominance have increasingly focused on the actual effect or likely effect of the conduct. Since the adoption of Regulation 1/2003 and particularly in the past decade, Commission interventions typically have focused on keeping markets open for new entrants.

The United States and Europe also view the potential costs of antitrust enforcement differently. In the United States, competition law is premised on skepticism, born from experience, regarding the abilities of agencies and courts effectively to police the market, due either to lack of expertise, practical limitations, or in recognition of the potential economic and social costs of mistakes. With respect to predatory pricing, for example, the Supreme Court reasoned that “the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.” More recently, when the Supreme Court rejected Section 2 liability for certain margin squeezes, it cited the difficulty of requiring “courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed” and was concerned that “firms that seek to avoid price-squeeze liability will have no safe harbor for their pricing practices.” U.S. courts are concerned that government-imposed antitrust remedies may do more harm than good to competition and consumers.

In sum, the differing views regarding the ability of the market to self-correct, the accuracy and effectiveness of enforcement actions, and the potential cost of enforcement errors drive some of the transatlantic differences in the approach to single-firm conduct.

49. The EC’s Google Shopping decision holds that Article 102 prohibits conduct “that tends to restrict competition or is capable of having that effect, regardless of its success. This occurs not only where access to the market is made impossible for competitors, but also where the conduct of the dominant undertaking is capable of making that access more difficult, thus causing interference with the structure of competition on the market.” Google Search (Shopping), Comm’n Decision ¶ 339 (June 27, 2017) (summary at 2018 O.J. (C 9) 11), public version at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf (appeal pending).


51. linkLine, 555 U.S. at 453.
B. Differences in Legal Structure

1. Legal Systems

While some have suggested that a root of divergence between U.S. and European competition law lies in distinctions between common law and civil law, the Task Force has not found this to be the case.

Certainly, much of competition law in the United States is common law, including for the law governing single-firm conduct. Section 2 contains just a few words using general terms. Congress drafted Section 2 in broad strokes, intending the courts to work out the meaning of “monopolize” and “attempt to monopolize.”\footnote{Frank Easterbrook aptly described the Sherman Act as a “blank check,” as U.S. courts have significant latitude to interpret Section 2, delving deeply into complex economic issues that are often determinative.}

The foundational norms in EU competition law are not materially different from their U.S. equivalents. Similar to Section 2, Article 102 of the TFEU (Article 102) is written in very general terms (although with an important additional layer of detail discussed below). Most of Europe, however, follows a civil law tradition, in which case law is less developed and has far less formal precedential value than appeals court decisions in the United States. Yet, today it is unclear whether competition law in Europe follows the civil law model, or instead is a civil-and-common-law hybrid. Decisions of the EU courts are the main source material for standards and rules applicable in competition cases, which is indicative of a common-law system.

2. Foundational Text

Despite similar foundational norms, the texts of Section 2 and Article 102 are materially different. Section 2 prohibits monopolization and attempted monopolization; hence, it prohibits certain conduct—loosely defined as other than “competition on the merits”—through which a company gains or maintains a monopoly market position.\footnote{See, e.g., Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454 (1993) (“The legislative history does indicate that much of the interpretation of the necessarily broad principles of the [Sherman] Act was to be left for the courts in particular cases.”).}

\footnote{Frank H. Easterbrook, \textit{Workable Antitrust Policy}, 84 MICH. L. REV. 1696, 1703 (1986).}

\footnote{See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985).}
By contrast, Article 102 is both more specific and broader in most respects than Section 2. To be sure, Section 2 and Article 102 both prohibit maintenance of a dominant position through improper means but the text of Article 102 makes clear that it prohibits more. Article 102 illustrates what constitutes an abuse with nonexhaustive examples, including “imposing unfair purchase or selling prices or other unfair trading conditions” or “limiting production, markets or technical development to the prejudice of consumers.” These examples have been read to extend the reach of Article 102 beyond that of the Sherman Act to include exploitative abuses. The Commission has used these provisions judiciously: “enforcement action against [high] prices has only been considered as a last resort, in markets where high prices and high profits do not have their usual signalling function to attract entry and expansion because of very high and long lasting barriers to entry and expansion.” In most cases, the Commission has only found an infringement when exploitation was accompanied by some other harm, such as a restriction on trading across Member State lines. Thus, while the exploitative dimension of Article 102 is broad, to date, prosecutorial discretion has tended to hold it at bay.

Further, unlike Section 2, Article 102 does not prohibit conduct by a firm that was not already dominant but became dominant as a result of the conduct, no matter how abusive the conduct. In Rambus Inc. v. Federal Trade Commission, for example, the FTC’s complaint alleged that Rambus’s anticompetitive and deceptive conduct caused it to become dominant. That theory stated a claim under Section 2, although the FTC lost the case on the facts. By contrast, Article 102 prohibits only conduct by firms that are already dominant, therefore, the EC’s case against Rambus was conceptually different. The Commission alleged that Rambus abused its dominance by asserting its patents to charge excessive prices after it had obtained a dominant position. Rambus’ allegedly deceptive conduct before it obtained its dominant position was not an element in the Commission’s case.

56. The treatment of excessive pricing under European competition law generally is discussed in Chapter VI.
57. Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).
3. Enforcement Structure

U.S. enforcement against unilateral conduct, whether public or private, entails an adversarial proceeding, and unilateral conduct claims ultimately are adjudicated by generalist judges or, in many private cases, by lay juries. In proceedings under Section 2, an independent tribunal adjudicates the case. Plaintiffs have a heavy burden of proof, and many cases are dismissed in pre-trial proceedings. Accused companies have rights of third-party discovery and cross-examination. Unless there is no genuine dispute as to any material fact in a case, or a consent judgment, a remedy in a case brought by the Federal Trade Commission (FTC) or DOJ can be imposed by a court or the FTC only after the court or the FTC has conducted a trial or other evidentiary hearing. In a Section 2 case, the government or private plaintiff must show that the “defendant has engaged in anticompetitive conduct that ‘reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.” If a plaintiff does so, the defendant still can prevail by asserting a procompetitive justification for the conduct.

Article 102 is enforced by the Directorate General for Competition of the EC, an administrative agency with broad powers to investigate, declare infringements, and impose remedies. Under Article 2 of Regulation 3/2003, Article 102 is also enforced by the national

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59. A majority of the FTC’s contested single-firm conduct cases are brought in the FTC’s administrative adjudication, with the initial decision made by an independent administrative law judge. While the decision-making structure is different, the process involves an adversarial process, including the same discovery, examination and cross-examination of witnesses, etc. that is available in federal court. Commission decisions can be appealed to the appellate courts.

60. The FTC can impose a behavioral remedy (disgorgement is unavailable) after a Commission decision. Remedies usually are stayed pending appellate review.


62. Microsoft, 253 F.3d at 59.

63. The EC ultimately takes enforcement actions, acting upon the recommendation of its Competition Commissioner, based upon the work of the Competition Directorate, Directorate General for Competition. Through Regulation 1/2003, Article 102 is also enforced by the national
1/2003 and case law, the burden of proof of the existence of circumstances that constitute an infringement of Article 102 is borne by the Commission. The Commission, however, need not satisfy an independent tribunal before effectuating its decision or imposing fines. Nor does the Commission conduct an adversarial hearing, or afford accused companies rights of third-party discovery and cross-examination.64

The European courts developed form-based rules for certain types of conduct of dominant firms, most notably exclusivity arrangements and loyalty rebates. Conduct found to be of such a type is presumed to be unlawful. The dominant firm can then put forward argument and evidence showing that the conduct does not foreclose rivals or raise a plea of objective justification.65 It then falls to the Commission, if it proposes to make a finding of abuse, to show that the conduct is anticompetitive or that the justification cannot be accepted. Guidance from EC, however, has indicated that it will accept a justification only if the “conduct in question is indispensible” to achieve “substantial efficiencies which outweigh any anticompetitive effects on consumers”66 For some years there was a perception that certain types of conduct were presumptively unlawful, and as a practical matter, could not be justified, which reduced the potential burden on the Commission to find infringement, and made it easier to successfully defend its decision on appeal.

Recently, however, the Court of Justice of the European Union (CJEU) in Intel clarified its Hoffmann-La Roche & Co. AG v Commission of the European Communities judgment67 in important aspects. While

competition authorities of the EU member states. Much of the significant precedent set by the Court of Justice is based on NCA decisions.

64. Procedural similarities also exist. For example, both U.S. and EU enforcers permit defendants access to portions of the investigation file. EU courts also review EC decisions; however, the procedural context is different from the trials that U.S. enforcers bring in order to establish liability in the first instance.


67. Case 85/76, Hoffmann-La Roche & Co. v. Comm’n, 1979 E.C.R. 461, ¶ 89 (“An undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article [102] of the treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of
maintaining the presumption of illegality, the court held that the dominant firm can rebut the presumption by introducing during the administrative procedure evidence that its conduct was not capable of foreclosing equally efficient rivals. In that event, the Commission must fully evaluate the evidence submitted by the dominant firm before it may find that, in its view, the dominant firm has failed to prove that the conduct is “incapable” of foreclosing competition in a way that may distort competition in the market.

Commission decisions can be appealed, but fines must be paid and remedies complied with before a protracted court review process begins. The standard of review of Commission decisions is a so-called “legality standard,” with the courts assessing whether the Commission has committed a “manifest error of assessment.” In addition, the jurisprudence of the courts grant the Commission a large “margin of discretion,” in particular with respect to complex economic matters.

69. Id. ¶¶ 139–44.
70. Applications for interim measures are possible, but rarely granted due to a very high standard of requiring irreparable harm as a consequence of the immediate application of an EC decision.
71. Case C-12/03 P, Comm’n v. Tetra Leval BV, 2005 E.C.R. 1-00987, ¶ 27. See Article 230 TFEU ¶ 2: “[i]t shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.”
As the Microsoft Corp. v. European Commission judgment explained: “although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.” Further, “in so far as the Commission’s decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission’s.”

4. Private Enforcement

Another factor in driving the transatlantic differences is private enforcement. In the United States, Congress intended private enforcement to play a central role under the Sherman Act, and it has. Private damages in the United States have both a deterrence function and a compensation function. Treble damages were intended from the outset both to deter wrongdoers and to incentivize potential plaintiffs and plaintiffs’ lawyers to take on the difficult and costly task of complex litigation. The power of these incentives grew to the point that antitrust damages cases exploded in the 1960s. The subsequent evolution of antitrust law in the United States has been influenced by the prevalence of private enforcement, the

discretion and will not second-guess conclusions if based on sufficient evidence, unless the Commission made a manifest error.”).

74. Id. ¶ 88.
75. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (“The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.”).
76. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (the treble damages provision of U.S. antitrust law was designed “to compensate victims of antitrust violations for their injuries”).
77. See, e.g., Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972) (“Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”).

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availability of treble damages, class actions, contingency fees, and trial by jury. Scholars have observed that prevalent private enforcement may have contributed in some instances to more conservative judicial rulings, as well as to increased deterrence.78

Just as antitrust law became less interventionist in substance, under the influence of the Chicago School, the courts also perceived a need for innovation to cope with often questionable private damages cases that forced settlements by the sheer size and cost of discovery and treble damage risk. Recognizing that the interests of private litigants can substantially diverge from those of the general public, the courts adopted procedural mechanisms to weed out nonmeritorious cases while limiting expensive discovery and trials. Most recently, the Supreme Court chose the class action antitrust case Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)79 to impose more rigorous pleading standards for all civil cases in the federal courts.

Over the past half century, most private monopolization cases were brought by business suing a much larger rival for damages caused by its allegedly exclusionary conduct. Plaintiffs nearly always invoked their constitutional right to trial by jury. The substantive U.S. law on single-firm conduct thus developed in large part through private disputes often resolved by lay people presented with a set of jury instructions and the daunting task of applying complex legal and economic principles and evidence to complicated facts. Recognizing that antitrust asks a great deal of juries and that there is an inherent risk of “false positives” when juries are invited to condemn aggressive but competitive conduct,80 courts influenced by the Chicago School set about to make it more difficult to get a case to trial. U.S. courts developed substantive antitrust standards that could be used both to instruct juries and to review verdicts, and, because they are substantive standards, they apply in both private and government cases. An example is predatory pricing, for which the Supreme Court

78. See, e.g., Jonathan M. Jacobson & Joyce Choi, Curtailing the Impact of Class Actions on Antitrust Policy, 66 N.Y.U. ANN. Surv. AM. L. 549, 555 (2011) (“It seems plain that the potential excesses inherent in antitrust class action litigation have had some impact on the Supreme Court. . . . What the Court has done . . . is to narrow the substantive scope of the antitrust laws—sometimes in an excessive and unfortunate way.”).
80. An erroneous jury verdict on a § 2 claim was set aside and judgment entered judgment for defendant, for example, in Fineman v. Armstrong World Indus., Inc., 980 F.2d 171 (3d Cir. 1992).
imposed stringent standards in 1993.\textsuperscript{81} Since then, no plaintiff has won a predatory pricing case, and the government’s only major case was dismissed on summary judgment.\textsuperscript{82}

In the European Union, private enforcement has been slow to develop, although, in principle, EU competition law has always been enforceable before national courts. In the past 15 years, though, there has been a significant increase in private litigation in some EU member states, although almost exclusively follow-on damages actions in cartel cases. With the adoption of the 2014 directive on antitrust damages actions,\textsuperscript{83} all EU member states are required to provide for the recovery of damages in competition cases, and several provisions in the directive, such as provisions related to discovery, should facilitate the bringing of damages actions for antitrust infringements, including under Article 102. Follow-on damages actions in Article 102 cases are rare, however, presumably because it is difficult to demonstrate measurable harm from exclusionary conduct.\textsuperscript{84}

Standalone private enforcement actions under Article 102 also have been rare. One reason is that most national jurisdictions (with the notable exception of the United Kingdom) had not provided for discovery. For this and other reasons, it has been very difficult for plaintiffs to prove an infringement of Article 102. As a consequence, a competitor frustrated by a dominant rival typically does not file suit in court, but rather files a complaint with the Commission (or member state authority),\textsuperscript{85} which has

\begin{itemize}
  \item \textsuperscript{82} United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001), aff’d, 335 F.3d 1109 (10th Cir. 2003).
  \item \textsuperscript{84} While rare, they do occur. In 2012 and 2015 U.K.-based price comparison websites Foundem and Kelkoo sued Google. The cases were put on hold pending the EC’s decisions and Google’s appeal. In April 2019, idealo internet GmbH sued Google in the Berlin Regional Court €500m as a follow-on claim to the EC’s \textit{Shopping} decision. See IDEALO, \textit{Idealo Suing Google for Damages Caused by its Abuse of Market Dominance}, (Apr. 12, 2019), https://www.idealoe.de/unternehmen/pressemitteilungen/idealo-suing-google-for-damages-caused-by-its-abuse-of-market-dominance/.
  \item \textsuperscript{85} The EC’s cases against Intel and Microsoft were initiated through complaints filed by their smaller competitors, Advanced Micro Devices, Inc. and Sun Microsystems. In these and similar cases, the complainant
to investigate or provide a reasoned decision not to investigate.\textsuperscript{86} Moreover, no Member State has adopted the full combined force, seen in the United States, of treble damages and “opt-out” class actions, in which a few named plaintiffs can file suit on behalf of thousands (or millions) of class members.\textsuperscript{87} Given the dearth of Article 102 private enforcement cases litigated before national courts, it is too early to tell whether the European Union’s push for more private enforcement might in the future also impact the development of substantive competition law doctrine, similar to what some have observed in connection with Section 2.\textsuperscript{88}

5. Remedies Versus Penalties

When a company is found to have violated Section 2, a U.S. court exercises its equitable and statutory powers to impose remedies. Injured plaintiffs can be awarded damages, and the court typically issues a prohibitory injunction to end the exclusionary conduct and prevent its reoccurrence.\textsuperscript{89} Courts in the United States also have significant discretion thus reaps its rewards not in the pay out of damages awards, but rather in the marketplace through the fines and conduct remedy imposed on the offending market leaders.

\textsuperscript{86} Under Article 263 TFEU, third parties have the right to, and do, challenge EC findings of no infringement of Article 102. Similarly, parties can, and do, also challenge EC decisions not to take forward a complaint. See, e.g., Case T-296/09, Eur. Fed. Ink & Ink Cartridge Mfgs. v. Comm’n, ECLI:EU:T:2011:693 (third party challenged the EC’s finding that the firm was not dominant in aftermarkets) (appeal pending).

\textsuperscript{87} “Opt-out” class actions are possible in the United Kingdom, and they are not prohibited by EU law. Treble damages would run afoul of the EU Damages Directive’s prohibition on “overcompensation whether by means of punitive, multiple or other damages.” Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1 ¶ 13.


\textsuperscript{89} The remedy in a § 2 case should “seek to ‘unfetter a market from anticompetitive conduct,’ to ‘terminate the illegal monopoly, deny to the
to customize remedies to fit the specific conduct condemned and the other circumstances of the case.\textsuperscript{90} For example, equitable remedies can contain mandatory provisions requiring the defendant to engage in specified activities, such as forcing a party to sell products to a competitor. Although rarely utilized, courts have the power to impose structural remedies, if necessary, to “restore” competition in the market, often by requiring the defendant to divest certain assets.

Remedies under Article 102 are similar in design and purpose to those under Section 2, but the fines imposed under Article 102 are not comparable in concept or magnitude to the damages awarded under Section 2. The Clayton Act limits recovery to treble damages—i.e., three times the harm “sustained.”\textsuperscript{91} Treble damages are meant to incentivize lawsuits and to serve a deterrent function, but awards in civil cases cannot be punitive.\textsuperscript{92} In contrast, huge fines\textsuperscript{93} imposed under Article 102, justified by the Commission as a necessary deterrent, are expressly based on a defendant’s relevant sales directly or indirectly related to the abusive behaviour, and are capped at 10 percent of total global, company-wide turnover, rather than any estimate of harm sustained.\textsuperscript{94} The fining guidelines explain that: “Fines should have a sufficiently deterrent effect, defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.” United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) (en banc) (citations omitted) (quoting Ford Motor Co. v. United States, 405 U.S. 562, 577 (1972) and United States v. United Shoe Machinery Corp., 391 U.S. 244, 250 (1968)).


not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).”

The EU Fining Guidelines and their application in Article 102 cases distinguish the treatment of unilateral conduct in Europe from that in the United States. The Fining Guidelines apply to all infringements of Article 101 or 102. While disputes may arise as to causation and measurement, the Guidelines permit the same fines for unilateral conduct violations as in hardcore cartel cases, with the only exception being an increase of 15-25 percent of the value of one year’s sales as an extra deterrent for cartels. The Guidelines provide discretion to find that the gravity of unilateral conduct offenses is far less than the gravity of cartel offenses, but practice has been to the contrary: “All [Article 102] abuses have invariably been qualified as either ‘serious’ or ‘very serious,’ . . . and no distinction in the level of fines is therefore discernible, i.e. any abuse warrants the same treatment and is considered serious or very serious.”

IV. ANALYTIC DIVERGENCE BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

A. Assessment of Monopoly Power and Dominance

There is broad consensus across jurisdictions that single-firm conduct is unlikely to be problematic under competition law unless the firm engaging in the conduct possesses a significant degree of market power.


Yet because most firms enjoy some market power (especially those producing differentiated products), simply saying that conduct is problematic only if the firm enjoys “market power” is not meaningful. U.S. law requires “monopoly” power; EU law requires “dominance.” Despite differences in terminology, monopoly power and dominance perform the same function as a threshold requirement for single-firm conduct cases, and essentially require a finding of a high degree of durable market power.

Market shares are used widely as at least an initial indicator of the degree of a firm’s market power. While the market shares associated with some past dominance cases in Europe are decidedly lower than those associated with monopoly cases in the United States, more recent enforcement actions of both the United States and the EC have alleged market shares at or above 70 percent. Meaningful divergence may exist with respect to market definition in dominance cases with the EC sometimes delineating narrow markets based on evidence that U.S. courts would be unlikely to find persuasive. The Task Force is inclined to think that divergent outcomes between the U.S. agencies and the EC on whether a company possesses monopoly power or is dominant arise from different factual findings and different procedures.

98. See Frances Dethmers & Jonathan Blondeel, EU enforcement policy on abuse of dominance: Some statistics and facts, 38 E.C.L.R., Issue 4 (2017). However, national competition authorities bring Article 102 cases involving dominant firms with market shares closer to 50 percent, which is the share that triggers a presumption of dominance according to European case law. See Case C-62/86, AKZO Chemie BV v. Comm’n, 1991 E.C.R. I-3439, ¶ 60. As in the EC proceedings, the accused company can rebut the presumption and trigger the authority’s duty to examine the evidence and conduct an analysis of the strength of actual competitors, barriers to entry, and countervailing buyer power.

99. There was considerable discussion in the private bar about the EC’s decision in Google Shopping not to include merchant platforms such as Amazon as relevant competitors, as well as the decision in Android to define the relevant market as licensable mobile operating systems, thus excluding proprietary operating systems such as Apple’s iOS. In the Shopping decision, the EC considered and rejected alternative market definitions. See Google Search (Shopping), Case AT.39740, Comm’n Decision ¶ 609 (June 27, 2017) (summary at 2017 O.J. (C 9) 11), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1516198535804&uri=CELEX:52018XC0112(01). At the time of publication of this Report, the public version of the EC’s Android decision was not available.
There are increasingly calls, including some by competition authorities, for new ways of thinking about dominance in cases involving tech firms and thereby expanding enforcement. It would be premature to form views about whether these discussions will lead to legislative or policy choices that will move the jurisdictions closer together or further apart.

B. Analysis of Conduct

1. General Principles

Both Section 2 jurisprudence and Article 102 jurisprudence observe that conduct that harms rivals can be deemed “exclusionary” only if it is not “competition on the merits.” The European Intel judgment


101. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n. 32 (1985) (“Thus, ‘exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” (quoting 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626b, at 78 (1978)); Standard Oil Co of N.J. v. United States, 221 U.S. 1, 75 (1911) (condemning Standard Oil for achieving dominance “not as a result of normal methods of industrial development”).

102. Case 85/76, Hoffmann-La Roche Co. AG v. Comm’n, 1979 E.C.R. 461 ¶ 91 (“The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services 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.”). This “normal competition” phrasing appears in several cases. See C-209/10, Post Danmark A/S v. Konkurrenscrådet, ECLI:EU:C:2012:17,2 ¶ 24 (Mar. 27, 2012); Case C-62/86, AKZO Chemie BV v. Comm’n, 1991 E.C.R. I-3359, ¶ 69. See also JONATHAN FAULL & ALI NIKPAY, THE EU LAW OF COMPETITION ¶¶ 3.126–29 (1999).
explains that “not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation . . . .”

The EC and Community Courts protect the right of a dominant company to compete on the merits when its conduct can be matched by an as-efficient competitor. Similarly, the Supreme Court of the United States has held that Section 2 does not proscribe competition on the merits and stressed that whether “conduct may properly be characterized as exclusionary cannot be answered by simply considering the effect on” the plaintiff.

The CJEU often has invoked the principle that a dominant undertaking has a “special responsibility not to allow its conduct to impair genuine, undistorted competition.” This concept of “special responsibility” not to “distort” or “impair” competition has been cited as a significant point of divergence between the United States and the European Union, but some scholars argue that it is now irrelevant when determining liability under Article 102. While the EC and courts continue to cite the principle when describing the teachings of previous cases, the principle became less significant.

109. See RENATO NAZZINI, THE FOUNDATIONS OF EUROPEAN COMPETITION LAW: THE OBJECTIVE AND PRINCIPLES OF ARTICLE 102, 175 (2011) (“‘Special responsibility’ is not a legal doctrine because it does not define legal rules. It is a short-hand to describe and explain their operation. Importantly, the doctrine of special responsibility must not be used as a formula according to which duties and liabilities can be imposed on the dominant undertaking. Duties and liabilities can be imposed on the dominant undertaking only under tests that concretize the general precepts of Article 102 in the light of its objective.”).
prominent as a decision rationale with the development of more concrete standards for determining liability (discussed in the next section). The Microsoft court, for example, applied the concept of special responsibility broadly by stating that “whilst the finding of a dominant position does not in itself imply any criticism of the undertaking concerned, that undertaking has a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market.” Ten years later, the Intel court significantly narrowed the concept of special responsibility by stating that it “prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself.”

The special responsibility of dominant companies continues to be a prominent theme in the EC’s enforcement program, appearing in decisions, press releases, and speeches. It may serve as a type of shorthand to indicate Europe’s focus on market structure. Nevertheless, the concept of special responsibility appears to have no independent force, but rather serves as a reference to evolving legal standards defining when Article 102 is infringed.

2. Assessing Market Impact

Under Section 2, a court will not find a violation unless the conduct at issue has what courts call “market-wide” impact, which is distinguished from harm to a particular market participant. In an attempt-to-monopolize case, the conduct must create a dangerous probability of propelling the defendant into a dominant position with similar likely effects. In a monopoly-maintenance case, the conduct must be “reasonably capable of contributing significantly to a defendant’s continued monopoly power.” Importantly, in the United States, harm to rivals is not enough; the conduct

113. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993) (“We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize”).
must also enable the monopolist to achieve or maintain power over market-wide price, output, quality, or innovation. In contrast, whether conduct constitutes an exclusionary abuse under Article 102 turns on whether it is deemed “capable” of an exclusionary effect. The Court of Justice has held that a purely theoretical possibility of an anticompetitive effect does not suffice. Post Danmark II explained that, “in order to determine whether” conduct “is capable of having an exclusionary effect on the market contrary to Article 82 EC, it is necessary to examine all the circumstances of the case, in particular, the criteria and rules governing the grant of the rebates, the extent of the dominant position of the undertaking concerned and the particular conditions of competition prevailing in the relevant market.”

That judgment further explained that an “anticompetitive effect... must be probable,” but there is “no need to show that” the anticompetitive effect “is of a serious or appreciable nature.” The CJEU Intel decision clarified the assessment of market impact when the dominant firm introduces evidence that its conduct was not capable of foreclosing equally efficient rivals. In that event, the EC must fully evaluate market impact, considering, among other things, “the share of the market covered by the challenged practice.”

When the EC applies an effects test, whether it finds an infringement often hinges on the quantum and quality of evidence needed either to find actual anticompetitive effects or to infer likely adverse effects.

For example, in the Google Shopping matter, the EC found Google liable for restricting competition in comparison shopping based on a demonstration of anticompetitive effects that, while extensive, focused on the fact that Google’s infringing conduct had diverted significant traffic away from third-party comparison shopping websites, and only discussed briefly...
potential anti-competitive effects in the national markets for general search services. In the United States, the FTC found insufficient evidence to take action.

While there appears to be a growing transatlantic consensus in the 21st Century on the value of an effects test, differences remain in the application. A violation of Section 2 is understood to require a somewhat different showing of effects than a violation of Article 102. In the Google Shopping decision, the EC followed precedent in asserting that Article 102 prohibits conduct that harms consumers “through [its] impact on an effective competition structure,” relying on a recent CJEU decision holding inter alia that the “competition rules of the Treaty” were designed “to protect the structure of the market and thus competition as such.” In essence, Article 102 is understood to protect the competitive process by protecting competitors’ access and ability to contest markets “on the merits,” at least “competitors considered to be as efficient as [the dominant firm] is itself. In contrast, the philosophy of the U.S. courts has long been that articulated by Judge Easterbrook three decades ago:

Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals’ wounds.

This difference in philosophy and assessment of market impact continues to produce some divergent outcomes.

V. ILLUSTRATIVE EXAMPLES OF DIVERGENT ANALYSIS

120. Id. at ¶ 332.
123. Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1338 (7th Cir. 1986).
This section discusses the similarities and differences detailed in Chapters II–IV as applied to specific types of unilateral conduct.

A. Refusals to Deal and Margin Squeeze

In Europe\textsuperscript{124} and the United States,\textsuperscript{125} dominant firms—like all other firms—generally are free to decide with whom they deal and on what terms. In the United States, this doctrine goes back to 1919,\textsuperscript{126} although the Supreme Court found that refusals to deal violated Section 2 on several occasions.\textsuperscript{127} In Europe, freedom of contract is a fundamental principle enshrined in European competition law,\textsuperscript{128} and “a dominant firm is generally entitled to pursue legitimate, profit-maximising strategies, including by deciding with whom it wishes to establish business

\begin{itemize}
  \item \textsuperscript{124} See Case C-418/01, IMS Health v. NDC Health, 2004 E.C.R. I-5039, ¶ 34 (“According to settled case-law, the exclusive right of reproduction forms part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position . . . .”); EC Guidance on Applying Article 82, supra note 66, ¶ 75 (“generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners”).
  \item \textsuperscript{125} See Pac. Bell Tel. Co. v. linkLine Commc’ns, 555 U.S. 438, 448 (2009) (“As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.”).
  \item \textsuperscript{126} See United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”).
  \item \textsuperscript{127} See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 505 (1985); Otter Tail Power Co. v. United States, 410 U.S. 366, 368 (1973) (Court upheld an injunction requiring a firm to sell electric power at wholesale to towns seeking to establish their own municipal power systems and also to transmit electricity generated by other power companies, explaining that the firm’s “refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position.”). More recently, the Court remanded for trial a case involving Kodak’s refusal to sell Kodak parts to independent service operators, explaining that although “it is true as a general matter a firm can refuse to deal with its competitors, “that right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.” Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 483 n.32 (1992).
\end{itemize}
relationships, concerning what product, and in deciding what quantities, if any, it wishes to sell to third parties.” To the extent that there is divergence between the United States and Europe, it is in the nature and scope of exceptions to the general rule.

U.S. law has made an exception when the refusal points to the alleged monopolist’s willingness to sacrifice near-term profits in favor of longer-term monopoly gains. A prior course of presumably profitable dealing can be evidence of such a motive because it “suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end.” And a monopolist may be able to justify its conduct by demonstrating that the conduct was economically rational and is therefore explained other than by its exclusionary effect.

The European approach focuses on the refusal’s impact. In deference to the dominant firm’s qualified prerogative to select its partners and customers, the legal test requires that the refusal involves an indispensable input controlled by the dominant firm and that the refusal therefore results in the elimination of all effective competition downstream. In addition, the refusal must cause consumer harm, for example, keeping a new or

129. Romano Subiotto & Robert O’Donoghue, Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers Under Article 82 EC, 24 EUR. COMPETITION L. REV. 683, 683 (2003). See Case 27/76, United Brands Co. v. Comm’n, 1978 E.C.R. 207, ¶ 189 (“the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked”).

130. See Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1075 (10th Cir. 2013).


133. See Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, 1998 E.C.R. I-7791, ¶¶ 38, 41, 45. The indispensability requirement aims at ensuring that the dominant firm is not forced to share the fruit of its investments with its current or potential competitors simply because it could be more difficult for those competitors to develop their own upstream input. Thus, in addition to protecting the dominant firm’s own incentives, this requirement also is intended to provide incentives for competitors to invest and innovate. The Microsoft case clarified that the refusal need only eliminate all “effective competition,” not all competition in the market. Case T-201/04, Microsoft Corp. v. Comm’n, 2007 E.C.R. II-3619, ¶¶ 229, 563.
improved product from the market. The dominant firm is entitled to attempt to justify the refusal on the grounds of protecting its own incentive to innovate but it bears the heavy burdens of proving both that harm to its innovation would occur absent the refusal and that the harm from the refusal to supply outweighs the negative consequences of imposing an obligation to supply.

Divergence on refusals to deal might stem from the economic history discussed in Chapter III and the European desire to use competition enforcement as a tool for opening markets. The few modern EC cases on refusal-to-deal tended to involve a formerly state-owned enterprise with monopoly rights in some aspect of the market or with control of infrastructure built with state money, foreclosing access to a downstream competitor. These companies are regulated but that does not preclude the application of competition rules, and the EC often intervenes in regulated industries when the conduct at issue is within a margin of discretion allowed by the sectoral regulators.

Notable EU refusal-to-deal cases have involved intellectual property, which raises concerns about the dampening of incentives to innovate. An unconditional, unilateral refusal to license intellectual property, without more, has never been found to be a violation of Section 2.


135. See id.; EC Guidance on Applying Article 82, supra note 66, ¶¶ 89–90.


137. Concern about chilling innovation incentives is one reason that European decisions require “indispensability,” not a lesser standard, when prohibiting refusals to deal. See Oscar Bronner GmbH & Co. KG, ¶¶ 38, 41, 45.

an unconditional, unilateral refusal to license intellectual property can violate Article 102.\textsuperscript{139} While EU competition law does not take issue with the existence of intellectual property rights, the exercise of an exclusive right by the IP holder can constitute abusive conduct.\textsuperscript{140} EU law considers whether the intellectual property of the dominant firm is “indispensable” to a rival’s success in an adjacent market, so that “the refusal is of such a kind as to exclude any effective competition on that neighbouring market” and “the refusal prevents the appearance of a new product for which there is potential consumer demand.”\textsuperscript{141}

One aspect of refusal-to-deal law on which transatlantic differences could be significant is the “essential facilities” doctrine. A few older U.S. cases invoked the essential facility doctrine in granting access to physical

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\textbf{ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 13.03[C] (3d ed. 2018) (“Where an essential facility claim is premised solely on ownership of an intellectual property right . . . by a vertically integrated monopolist, . . . we believe that the purposes of antitrust law are best served by denying such a claim outright.”).}
\end{center}

\textsuperscript{139} See Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039, ¶ 38 (“[I]n order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.”); Joined Cases C-241/91 P & C-242/91, Radio Telefis Eireann & Indep. Television Pubs. v. Comm’n, 1995 E.C.R. I-743, ¶ 48–54; see also Case T-201/04, Microsoft Corp. v. Comm’n, 2007 E.C.R. II-3601, ¶ 331 (refusal to license infringes Article 102 in “exceptional circumstances”).


\textsuperscript{141} Case T-201/04, Microsoft v. Comm’n, 2007 E.C.R. II-3601, ¶¶ 332–33. As in \textit{IMS Health}, the refused intellectual property need not ever have been licensed. Case C-418/01, IMS Health v. NDC Health, 2004 E.C.R. I-5039.
facilities. Beginning in the 1980s, however, U.S. agencies and courts expressed concern that compelling access would undermine incentives to invest, innovate, and compete. In the 2004 *Trinko* decision, the Supreme Court declared that *Aspen Skiing*, which it termed the “leading case for § 2 liability based on refusal to cooperate with a rival,” was “at or near the outer boundary of liability,” and carefully distinguished the facts of *Aspen Skiing* from those in *Trinko*, stating that the courts should be “very cautious” about recognizing exceptions to the general principle that firms have the right to choose those with which they will deal.\footnote{142}{Verizon Commc’ns v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408–09 (2004).} The Court noted that it had “never recognized” the essential facilities doctrine and saw “no need either to recognize it or to repudiate it.”\footnote{143}{Id. at 411.} *Trinko* observed that imposing a duty to deal presents practical problems and could suppress competition: “Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.”\footnote{144}{Id. at 408.}

Citing EC decisions, the EC’s 2009 Priorities Paper lists “refusal to grant access to an essential facility” as a scenario in which a refusal to deal could infringe Article 102.\footnote{145}{See EC Guidance on Applying Article 82, supra note 66, ¶ 78 (citing cases).} The United States and European Union largely cite the same policy considerations in considering whether compelling access to an essential facility would be appropriate, but neither the EC nor the Community Courts have explicitly recognized the remedial challenges that animated the Supreme Court’s analysis in *Trinko*. The CJEU decision in *Microsoft*, upholding the imposition of a duty to share information needed to maintain interoperability, postdates the Supreme Court’s decision in *Trinko*.\footnote{146}{The D.C. Circuit subsequently upheld the imposition of a remedy in the U.S. *Microsoft* case that involved sharing of interoperability information, although the underlying § 2 violation was not a refusal to deal. Mass. v. Microsoft Corp., 373 F.3d 1199, 1215–25 (D.C. Cir. 2004). The Tenth Circuit still later rebuffed a refusal-to-deal claim against Microsoft involving very similar information. Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013). When Windows 95 was rolled out, Microsoft initially gave independent software developers detailed information on its}
A clear contrast exists regarding the practice known as “margin squeeze,” which is said to exist when a dominant, vertically integrated firm charges an input price to a nonintegrated rival that makes it impossible (or nearly so) for the rival to compete in the downstream market. In 2009, the Supreme Court of the United States held that margin squeeze cannot be a free-standing violation of Section 2; to be illegal, such conduct must constitute either an unlawful refusal to deal in the upstream market or predatory pricing in the downstream market. In rejecting Section 2 liability for margin squeeze, the Supreme Court cited the difficulty of requiring “courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed,” and was concerned that “firms that seek to avoid price-squeeze liability will have no safe harbor for their pricing practices.” In contrast, the CJEU held in 2010 that “a pricing practice adopted by a dominant undertaking which results in a margin squeeze of its competitors who are at least as efficient is to be regarded as unfair in the light of Article [102].” Hence, a margin squeeze is an abuse of dominance in its own right in Europe but not the United States, perhaps because Article 102 condemns “unfair” conduct but Section 2 does not.

B. Exclusive Dealing

The United States and Europe diverge with respect to the required showing of effects in exclusive dealing cases. In the United States, the focus is on the degree of foreclosure and impact on competition as a whole. Europe in contrast historically applied more bright line prohibitions on exclusive dealing by dominant undertakings regardless of the magnitude of foreclosure.

In a monopoly maintenance case under Section 2, the plaintiff must demonstrate that challenged conduct is “reasonably capable of

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148. Id. at 453.
contributing significantly to a defendant’s continued monopoly power.”\textsuperscript{151} This specific requirement has been applied in exclusive dealing cases,\textsuperscript{152} with one court highlighting that there “must be proof that competition, not merely competitors, has been harmed.”\textsuperscript{153} The courts have required proof of actual or probable anticompetitive harm,\textsuperscript{154} not merely the potential for harm.\textsuperscript{155}

Successful Section 2 complaints certainly exist,\textsuperscript{156} but many Section 2 challenges to exclusive arrangements involving dominant firms have been rejected by courts,\textsuperscript{157} often for lack of proof of sufficient anticompetitive effects.\textsuperscript{158} The Microsoft court explained that: “imposing upon a firm with market power the risk of an antitrust suit every time it enters into [an exclusive dealing arrangement], no matter how small the effect, would create an unacceptable and unjustified burden on such firm.”\textsuperscript{159} In addition, U.S. courts have doubted the exclusionary effects of restraints on distributors, rather than customers, when rivals potentially can reach

\textsuperscript{151} United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc).

\textsuperscript{152} \textit{E.g.}, McWane, Inc. v. FTC, 783 F.3d 814, 833 (11th Cir. 2015).

\textsuperscript{153} United States v. Dentsply Int’l, 399 F.3d 181, 187 (3d Cir. 2005).

\textsuperscript{154} \textit{See} McWane, 783 F.3d at 816 (“The governing Supreme Court precedent speaks not of ‘clear evidence’ or definitive proof of anticompetitive harm, but of ‘probable effect.’”).

\textsuperscript{155} \textit{See} Eisai, Inc. v. Sanofi Aventis US, LLC, 821 F.3d 394, 407 (3d Cir. 2016); Allied Orthopedic Appliances Inc. v. Tyco Health Care Group, 592 F.3d 991, 998 (9th Cir. 2010); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1060-63 (8th Cir. 2000).

\textsuperscript{156} \textit{See}, \textit{e.g.}, ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012); United States v. Dentsply Int’l, 399 F.3d 181 (3d Cir. 2005); United States v. Microsoft Corp., 253 F.3d 34, 68-71 (D.C. Cir. 2001) (en banc); \textit{see also} McWane, 783 F.3d 814 (applying essentially the standards applicable under § 2 in holding that an exclusive arrangement violated the FTC Act.).

\textsuperscript{157} \textit{See}, \textit{e.g.}, Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57 (3d Cir. 2010); NicSand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007) (en banc); PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101 (2d Cir. 2002); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589 (1st Cir. 1993); Barr Labs. v. Abbott Labs., 978 F.2d 98 (3d Cir. 1992); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987); Bayou Bottling v. Dr Pepper Co., 725 F.2d 300 (5th Cir. 1984).

\textsuperscript{158} See cases cited \textit{supra} note 150.

\textsuperscript{159} United States v. Microsoft Corp., 253 F.3d 34, 70 (D.C. Cir. 2001) (en banc).
customers in other ways.\textsuperscript{160}

In exclusive dealing cases, as in other types of abuse of dominance cases, the EC must show that the particular conduct is “capable of having an exclusionary effect.”\textsuperscript{161} Although the word “capable” might suggest that the possibility of theoretical exclusion is sufficient, recent decisions state that is not the case.\textsuperscript{162} On the other hand, an actual exclusionary effect need not be shown under this standard.\textsuperscript{163} Enforcement actions against exclusivity agreements need not demonstrate actual effects because exclusivity agreements are presumptively unlawful;\textsuperscript{164} however, recent EC decisions involving exclusivity clauses more generally have undertaken to demonstrate the likelihood of exclusionary effects, although such effects need not be either as palpable or impactful as in the United States.

In \textit{Van den Bergh Foods}, the Court of First Instance found an infringement in the practice of an ice cream manufacturer providing small retailers with a small freezer cabinet on the condition that only the manufacturer’s product be placed in it.\textsuperscript{165} The court found significant foreclosure because the practice was widespread and few retailers had sufficient space for a second freezer cabinet.\textsuperscript{166} In 2005, the EC returned to the subject of on-premises coolers with \textit{Coca-Cola}.\textsuperscript{167} In \textit{Coca-Cola}, the EC accepted a commitment by the drink manufacturer to reserve space in its coolers for rival’s products:

\begin{itemize}
\item \textit{See}, \textit{e.g.}, CDC Techs. v. IDEXX Labs., 186 F.3d 74, 80 (2d Cir. 1999); Omega Envtl. v. Gilbarco, Inc., 127 F.3d 1157, 1162-63 (9th Cir. 1997); Roy B. Taylor Sales v. Hollymatic Corp., 28 F.3d 1379, 1383 (5th Cir. 1994); Ryko Mfg. v. Eden Servs., 823 F.2d 1215, 1235 (8th Cir. 1987).
\item \textit{See id.} ¶ 67 ("only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article [102]"); Case C-413/14 P, Intel Corp. v. Comm’n, ECLI:EU:C:2016:788, ¶ 114 (Oct. 20, 2016) ("capability cannot merely be hypothetical or theoretically possible").
\item \textit{Id.} ("Certainly, evidence of actual effects does not need to be presented.")
\item Id. ¶¶ 86–87.
\end{itemize}
[F]irstly, where the cooler is provided free on loan, the Parties may impose cooler exclusivity unless no other installed chilled beverage capacity to which the consumer has direct access is available in the outlet in which case the customer may use at least 20% of the beverage cooler for any products of his choosing. Secondly, where a customer rents a cooler, he may, in any event, use at least 20% of the beverage cooler for any products of his choosing.168

Contrast the Van den Bergh Foods and Coca-Cola decisions with the U.S. court decision in Bayou Bottling.169 Bayou Bottling, a plaintiff soft drink manufacturer, alleged inter alia that LCC, a company manufacturing Coca-Cola and Dr Pepper soft drinks, violated the antitrust laws when LCC provided vending machines and coolers to retailers on the condition that only LCC drinks be offered in the machines and coolers. The court disagreed, affirming an award of summary judgment in favor of LCC and stating that:

Bayou complains that LCC does not permit retail outlets to place Bayou’s products in vending machines and coolers owned by LCC, and that LCC provides free maintenance service on machines and coolers owned by businesses if the machines and coolers are stocked only with LCC products. Without anything more, these practices are not barred by the antitrust laws. They are competitive acts. It ought to be apparent that “a monopolist’s right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business.”170

The Bayou Bottling court stated multiple times that what the plaintiff alleged was not injury to competition.171 The Task Force cannot be certain whether material facts differed from those in Van den Bergh Foods, but there is no doubt that the U.S. court’s attitude toward the claim was very different than that of the EU court.

C. Loyalty Discounts

Closely related to exclusive dealing arrangements are so-called “loyalty discounts” or “fidelity rebates.” Loyalty discounts are customer incentives—lower prices or other benefits—“earned” through the

169. Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1984).
170. Id. at 304 (quoting Northeastern Tel. Co. v. AT&T Co., 651 F.2d 76, 93 (2d Cir. 1981)).
171. See generally id. (using the phrase “antitrust injury” seventeen times).
customer’s “loyalty” to the dominant firm. While exclusive dealing arrangements most often involve an explicit requirement of exclusivity, loyalty discounts more frequently are seen as effectively achieving the same outcome through price incentives. That is to say, the discounts cause the customer to deal with the dominant supplier rather than competitors of the supplier, at least as to some large portion of its purchases.

In both the United States and the European Union, discounts based simply on the “volume” of a customer’s purchases from a dominant supplier are viewed as likely beneficial to consumers and routinely upheld, largely because significant economies are apt to be associated with transacting in larger volumes. Loyalty discounts, in contrast, are not based on volume; indeed, they are specifically designed so that both large and small customers can qualify for discounts by concentrating their purchases. Loyalty discounts reduce the price the customer pays for incremental units purchased below the price paid for inframarginal units; however, average price need not be reduced.

In the United States, courts have addressed two different theories under which a loyalty discount program employed by a dominant firm can violate Section 2. In early cases, loyalty discounts were evaluated much like predatory pricing, which is the obvious approach when the discount and condition qualifying for it are on a single product. More recent cases

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173. In Brooke Group, the practice at issue was challenged as predatory pricing and analyzed accordingly by the courts, but the practice was “rebates that increased with the volume of cigarettes ordered.” Brooke Group v. Brown & Williams Tobacco Corp., 509 U.S. 209, 214 (1993). The Court ruled that a claim of predatory pricing can be sustained under § 2 of the Sherman Act only if the prices of the dominant supplier were below an “appropriate measure of the supplier’s costs” and there was a “dangerous probability” that the supplier will “recoup” the losses incurred by the below-cost selling. Id. at 222–24. See also Concord Boat Corp. v. Brunswick Corp., 207 F.3d. 1039, 1060–63 (8th Cir. 2000) (market-share based discounts challenged in part as predatory pricing in violation of § 2).
generally have evaluated loyalty discounts much as exclusive dealing, and thus according to the standards discussed above.

In the European Union, only the latter approach has been taken. Early decisions by EU courts presumed that loyalty rebates were capable of exclusionary effects. In *British Airways*, however, the Court of First Instance ruled that loyalty rebates based on “economically justified considerations” were legal, and this was upheld by the CJEU in 2007. The CJEU held that loyalty rebates must be assessed on a case-by-case basis to determine whether (1) the rebate produces likely or actual exclusionary effects in that they make “entry very difficult or impossible for competitors” and make it “more difficult or impossible for the customer to choose between various sources of supply or commercial partners”; and (2) “there is an objective economic justification” for the rebates. In 2015, the CJEU held in *Post Danmark II* that the EC’s “as efficient competitor” test must “be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.” The Court declined to fix an appreciability threshold, i.e., require that the rebate scheme have a material impact on the market, stating: “[t]hat anticompetitive practice is, by its very nature, liable to give rise to not insignificant restrictions of

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174. *See, e.g.*, ZF Meritor, LLC v. Eaton Corp, 696 F.3d 254 (3d Cir. 2012). In *ZF Meritor*, the court rejected defendant’s argument that above-cost pricing was per se legal whatever the effects. According to the court, when a supplier with a significant market position offers substantial discounts (albeit above its costs) to all the market’s customers, and such discounts preclude competition from supplier’s rivals, the exclusivity resulting from the above-cost discounting practices violates § 2 of the Sherman Act.

175. Additional tests have been posited for specific factual scenarios, such as the “attribution” test where multiple products are involved, as stated in *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 916 (9th Cir. 2007). For most such fact-specific rules, there is not yet a clear U.S.-wide rule.


178. Id. ¶¶ 68–69.

competition, or even of eliminating competition on the market on which the undertaking concerned operates.”\textsuperscript{180}

The CJEU’s 2017 \textit{Intel} decision clarified the role of effects in an analysis of rebate schemes: provided the defendant puts forward evidence to dispute a foreclosure effect,

the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market . . . \textsuperscript{181}

Accordingly, \textit{Intel} maintains the presumption of illegality and holds that the dominant firm can overcome the presumption with substantiated arguments and evidence that the conduct was not capable of restricting competition. Whether a restraint is capable of restricting competition is now to be determined, not based on the form of the restraint, but by considering the factual circumstances of which there is evidence in the record. By confirming an “effects test,” this decision might have substantially reduced transatlantic divergence in the analysis of loyalty rebates. Nonetheless, different outcomes could arise from differences between the burden placed on the EC and that placed on a U.S. plaintiff.\textsuperscript{182}

\textbf{D. Leveraging and Technical Tying}

The U.S. Supreme Court once declared that “use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor [in another market], is unlawful” under Section 2.\textsuperscript{183} The Court, however, later articulated the narrow scope for that proposition:

\begin{quote}
\textsuperscript{180} \textit{Id.} \textsuperscript{¶} 73.
\textsuperscript{181} Case C-413/14 P, Intel Corp. v. Comm’n, ECLI:EU:C:2017:632, \textsuperscript{¶} 139 (Sept. 6, 2017). The CJEU observed that Article 102 does not “seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.” \textit{Id.} \textsuperscript{¶} 133. Although the U.S. Supreme Court has repeatedly stated that the antitrust laws do not protect competitors, it has not endorsed any comparable formulation for defining lawful competition on the merits under § 2.
\textsuperscript{182} In appealing to the CJEU, Intel raised issues relating to burden of proof, but the court did not sustain its objections to the EC’s judgment. \textit{See id.} \textsuperscript{¶¶} 15, 39, 59, 72, 112.
\textsuperscript{183} United States v. Griffith, 334 U.S. 100, 107 (1948).
\end{quote}
The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to “restrain trade” unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. ¹⁸⁴

The Court subsequently held that the use of monopoly power to gain a competitive advantage in another market violates Section 2 “only when it actually monopolizes [the second market] or dangerously threatens to do so.”¹⁸⁵ And in Trinko the Court made clear that a “monopoly leveraging” theory states a claim under Section 2 only if there is a dangerous probability of “monopolizing the second market.”¹⁸⁶

EU law requires less: EU courts hold that a dominant firm abuses that dominant position by engaging in conduct capable of restricting competition in a related market.¹⁸⁷ This contrast arises from the different ways in which the prohibitions of Section 2 and Article 102 are framed. The vast majority of U.S. cases involved alleged anticompetitive effects in the second market,¹⁸⁸ and while Section 2 is violated only by

¹⁸⁷. See Case C-95/04P, British Airways v. Comm’n, 2007 E.C.R. I-2331, ¶ 144 (Conduct infringes Article 102 when “it tends to distort that competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others.”)
¹⁸⁸. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984) (“When the seller’s power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.”). But see United States v. Microsoft Corp., 253 F.3d 34, 58–78 (D.C. Cir. 2001) (en banc) (holding that the defendant maintained its PC operating system monopoly in violation of § 2 in part by tying an internet browser to the operating system, which blunted competition to the operative system from competing browsers distributing platforms on which applications would run). See also Federal Trade Commission v. Qualcomm Incorporated, Case No. 17-CV-
monopolization and attempts to monopolize, Article 102 more generally prohibits abuse of a dominant position, and does not require the same degree of effects in the second market.

There are many variations on the leveraging theme, and the increased importance of digital technology is pushing “technical” or “technological” tying to center stage of the abuse of dominance cases. Technical tying is said to exist when a company designs (often, redesigns) some tying product so that it can be used only with its complementary tied product. The two products can be integrated together or sold separately. The United States and European Union have approached these scenarios with different levels of confidence about intervention.189

U.S. courts applying Section 2 “are properly very skeptical about claims that competition has been harmed by a dominant firm’s product design changes.”190 And when “valid technical reasons” are given for product design changes, the “plaintiff bears the burden not only of rebutting a proffered justification but also of demonstrating that the anticompetitive effect of the challenged action outweighs it.”191 If a dominant firm’s product “design change is an improvement, it is necessarily tolerated by [U.S.] antitrust laws, unless the monopolist abuses or leverages its monopoly power in some other way when introducing the

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00220-LHK (N.D. Cal. May 21, 2019; appeal pending). In Qualcomm, the court held that a firm that had monopoly power in modem chips violated the antitrust laws when it refused to sell chips to mobile phone manufacturers unless they also acquired a patent license covering rivals’ chips. The court explained that, under the circumstances and along with related practices, this condition enabled the defendant to obtain higher patent royalties and that the inflated royalties harmed competition and competing chip manufacturers, which lost chip sales and bore higher costs, reduced demand, and diminished margins.

189. An older example of the EC’s view in this regard is Case 89/113/EEC—Decca Navigator System, Comm’n Decision, 1989 O.J. (L 43) 27. The case involved a forerunner of the Global Positioning System. The dominant firm claimed that its exclusive sales actions were necessary to fund expensive transmission towers. The EC decision held that “the criticized behaviour remains abusive even if there were no other alternatives to those of ceasing to supply and abandoning the market” and that as an alternative to exit, the dominant firm had the option of pursuing “the take-over of the chain [of transmission towers] by the State.” Id. ¶ 113. Both positions are without precedent in U.S. antitrust decisions.


191. Id. at 67.
Moreover, the U.S. courts “have recognized the limits of their institutional competence and have on that ground rejected theories of ‘technological tying.’” And while the United States nominally continues to maintain a per se rule against tying under Section 1 of the Sherman Act, the D.C. Circuit has found that rule inapplicable to integrating additional functionality into software.

Under Article 102, however, “technical tying” effected through product design is treated much as contractual tying. The EC’s 2009 priorities paper explains that “[t]ying can take place on a technical or contractual basis,” that “[t]echnical tying occurs when the tying product is designed in such a way that it only works properly with the tied product (and not with the alternatives offered by competitors),” and that technical tying is especially likely to produce “anti-competitive foreclosure.”

192. Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991, 1000 (9th Cir. 2010). In contrast, one court held that a pharmaceutical manufacturer could have unlawfully maintained a monopoly in violation of § 2 by both introducing reformulated and freshly patented version of a drug about to lose its patent protection, and withdrawing the original version. See New York v. Actavis PLC, 787 F.3d 638, 651–58 (2d Cir. 2015). Although the product redesign did not offend the antitrust laws, the court held that withdrawing the original version, and forcing customers to migrate to the new version, could substantially impede generic competition in the relevant market and thus unlawfully maintain a monopoly.


194. See Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992) (tying “violates § 1 of the Sherman Act if the seller has ‘appreciable economic power’ in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market”); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) (tying is per se illegal when “competition on the merits in the market for the tied item is restrained” by the “the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”). But see Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 35 (2006) (“Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished.”).


196. EC Guidance on Applying Article 82, supra note 66, ¶¶ 49 & n.2, 53.
The judgment of the Court of First Instance in *Microsoft* upheld an infringement finding based on such a theory.\textsuperscript{197} Microsoft integrated the Windows Media Player into its Windows operating system.\textsuperscript{198} By doing so, the EC and Court of First Instance held that Microsoft unlawfully tied a secondary product subject to competition (streaming media players) to a primary product in which it was dominant (PC operating systems). Microsoft’s dominance in the operating system market led to a distortion in the media player market. In the United States, no agency or court prohibited Microsoft’s Windows Media Player integration.

Leveraging is playing a central role in the on-going EC Google cases. In June 2017, the EC fined Google after finding that it had given more favorable treatment in its general search results to its own Shopping service as compared to third-party comparison shopping websites, by demoting the third-party sites in its search results while displaying its Shopping service prominently.\textsuperscript{199} The EC concluded that there was a link between visibility in these search results and traffic, and that Google’s conduct diverted traffic: decreasing traffic that otherwise would have clicked through from Google’s general search results pages to the third-party sites, while increasing such traffic to Google’s own Shopping service.\textsuperscript{200} The EC found Google’s conduct could potentially “foreclose competing comparison shopping services, which may lead to higher fees for merchants, higher prices for consumers, and less innovation,” and “reduce the ability of consumers to access the most relevant comparison shopping services.”\textsuperscript{201}

The *Google Shopping* decision stated that “[d]ominant undertakings have a special responsibility not to impair, by conduct falling outside the


\textsuperscript{198} *Id.* ¶ 837, 935.

\textsuperscript{199} See generally Case AT.39740—*Google Search (Shopping)*, Comm’n Decision (June 27, 2017) (summary at 2018 O.J. (C 9) 11), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf (appeal pending). Despite the name of the case, only a small part of this case was about the separate Google Shopping service, which was a different web site. The case mainly concerned conduct involving Google’s general search results.

\textsuperscript{200} *Id.* at ¶ 452.

\textsuperscript{201} *Id.* ¶¶ 593, 597. Thus, the EC did not allege that Google failed to point consumers to comparison shopping services’ websites when consumers searched for them.
scope of competition on the merits, genuine undistorted competition in the
internal market,” and that “[a] system of undistorted competition can be
guaranteed only if equality of opportunity is secured as between the
various economic operators.”[202] It found that Google violated a duty
imposed by Article 102 by virtue of the fact that “Google does not position
and display in the same way results from Google’s comparison shopping
service and from competing comparison shopping services.”[203] And while
Google alleged a lack of actual effects due to the number of comparison
shopping services that continued to offer their services,[204] and in light of
the longstanding nature of the conduct (the EC opened the investigation
more than six years before the decision)[205], the EC relied on the capability
of the conduct to have the requisite effects[206] and further concluded that
sufficient effects were shown by traffic diversion.[207]

The EC’s Google Shopping decision stands in sharp contrast to the
2013 decision of the FTC to close its investigation, declining “to second-
guess a firm’s product design decisions where plausible procompetitive
justifications have been offered, and where those justifications are
supported by ample evidence.”[208] The FTC’s statement was similar to that
of the U.S. Court of Appeals for the Ninth Circuit that “product
improvement by itself does not violate Section 2, even if it is performed
by a monopolist and harms competitors as a result,” and “courts are
properly very skeptical about claims that competition has been harmed by
a dominant firm’s product design changes.”[209]

The Google Shopping and Microsoft decisions reflect the EC’s focus
on companies’ abilities to “leverage” market dominance in one market to
gain an advantage in another market. The EC’s embrace of this approach,
which does not require dominance or the likelihood of dominance in the

202. Id. ¶ 331.
203. Id. ¶ 662.
204. Id. ¶¶ 602, 603.
206. Google Search (Shopping), ¶ 602, 606.
207. Id. ¶ 607. The decision also briefly discussed the capability or likelihood
of anticompetitive effects in general search services. Id. at part 7.3.3.
208. Statement of the Federal Trade Comm’n Regarding Google’s Search
Practices, In the Matter of Google Inc., FTC File No. 111-0163 (Jan. 3,
295971/130103googlesearchstmttofcomm.pdf.
209. Allied Orthopedic v. Tyco Health Care Grp. LP, 592 F.3d 991, 998–99 (9th
Cir. 2010).
tied market, results in a more interventionist policy than the U.S. approach, which requires at least a dangerous probability of monopolization of the second market.

E. Predatory Pricing

The United States and the European Union diverge at least in form on predatory pricing. Both require some showing of prices below a measure of costs, and both consider similar factors. Only the United States requires a specific showing of the possibility of recoupment, but factors important to such a showing (e.g., high barriers to entry and a theory of harm that explains the dominant firm’s rationale and what it expects to gain from the conduct) are considered by both. EU case law arguably infers the possibility of recoupment from the fact of dominance.

In 1993 the Supreme Court held that any plaintiff complaining that its rival’s prices are too low, and thus violate Section 2, “must prove that the prices complained of are below an appropriate measure of its rival’s costs” and that the rival had “a dangerous probability, of recouping its investment in below-cost prices.”210 Critically, the Court did not demand any evidence on actual recoupment. The purpose of the Court’s recoupment requirement was not to determine whether a predatory pricing scheme was wise in hindsight, but rather to distinguish lawful competition from unlawful exclusion on the basis of objective market circumstances at the time of the conduct. If “sustained supracompetitive pricing” is implausible, there is an insufficient basis for condemning low prices, which obviously benefitted customers.211 Since 1993, no U.S. court has found unlawful predatory pricing, although the reason may have more to do with the requirement of proving pricing below cost than with the requirement of proving the possibility of recoupment.212

The CJEU views pricing below average variable costs as presumptively exclusionary.213 Shortly after the Supreme Court imposed

211. Id. at 224–26.
212. The Supreme Court has not provided guidance on the appropriate measure of cost, leaving the lower courts to develop standards.
213. See Case C-62/86, AKZO Chemie BV v. Comm’n, 1991 E.C.R. I-3359, ¶ 71. The European Union has not clearly acknowledged that costs properly viewed as variable nevertheless might be unavoidable over a short time frame, so selling below average variable cost can simply be the loss minimizing response to a combination of weak demand and strong competition.
the recoupment requirement in the United States, the General Court declined a specific invitation to impose the same requirement. On review, the CJEU held that there was no need to show that the target company “had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated . . . . The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.” In 2009 the court reaffirmed its position when a target company argued that it had submitted proof of the impossibility of recoupment. The court explained that pricing below average variable cost eliminated any ambiguity as to whether the conduct is exclusionary then added that “the lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position, in particular, following the withdrawal from the market of one or a number of its competitors.”

In Europe, predatory pricing infringing Article 102 may be evidenced by showing that a dominant firm deliberately incurred losses or gave up profits in the short term (what it terms “sacrifice”) so as to foreclose or likely foreclose competition. Relevant factors include high barriers to entry and the existence of a convincing predatory strategy. The strategy must be based on the intent to eliminate or exclude a competitor. The EC’s Priorities Paper notes that, if an equally efficient competitor “can compete effectively with the pricing conduct” in question, it will “infer that the dominant undertaking’s pricing conduct is not likely to have an adverse impact on effective competition.”

The difference between the United States and European Union on when aggressively low prices are contrary to unilateral conduct law again appears to stem from the underlying philosophies of their competition laws. The EC and the EU courts understand Article 102 to protect the competitive process by holding firms accountable for pricing below cost. The U.S. courts understand Section 2 to protect the competitive

218. EC Guidance on Applying Article 82, supra note 66, ¶¶ 63–64.
219. Id. ¶ 27.
220. For instance, in July 2019 the EC ruled against Qualcomm for selling “below cost, with the aim of forcing its competitor Icera out of the market.”
process by making it difficult to attack a dominant firm’s low prices. Consumers undoubtedly derive immediate benefits from low prices, and the U.S. courts are deeply concerned about the possibility of deterring legitimate price cutting.\textsuperscript{221}

VI. EXCESSIVE PRICING AND ABUSE OF SUPERIOR BARGAINING POSITION

A. Excessive Pricing

Exploitative abuse is not a recognized concept in the United States, and the regulation of prices is viewed as inconsistent with the competition principles on which antitrust is based.\textsuperscript{222} Indeed, the Supreme Court stressed in the \textit{Trinko} case that “The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”\textsuperscript{223} Outside the United States, however, exploitative abuse typically is a recognized concept, and competition authorities are empowered to act as price regulators, although they are cautious in exercising that power. The concept is applied when there is no real prospect of the market forces addressing prevailing high prices in a reasonable timeframe and there is no regulatory mechanism to address the high prices.\textsuperscript{224} Enforcement in several countries has recently been focused on pharmaceuticals and standard essential patents (SEPs).\textsuperscript{225}

\textsuperscript{223} Verizon Comm’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). \textit{See} Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979) (“A pristine monopolist, we have held, may charge as high a rate as the market will bear.”).
\textsuperscript{224} \textit{See} Frederic Jenny, Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment, SSRN (Sept. 11, 2016), https://ssrn.com/abstract=2880382.
\textsuperscript{225} Harry First, Exploitative Abuses of Intellectual Property Rights, in THE CAMBRIDGE HANDBOOK OF ANTITRUST, INTELLECTUAL PROPERTY, AND HIGH TECH 241 (Roger D. Blair & D. Daniel Sokol eds., 2017).
1. Europe

In the European Union, excessive pricing may constitute an infringement of Article 102(a), which provides a legal basis for the prohibition of exploitative abuse, i.e., a dominant firm’s imposition of unfair purchase or selling prices or other unfair trading conditions. In the United Brands case, the CJEU developed a two-step legal test for establishing excessive pricing under Article 102: An abuse arises if (1) the difference between the cost incurred and the price charged is excessive, and (2) the price is unfair, either in itself or when compared with competing products. While this legal test is well-established, its practical application may give rise to difficulties. In particular, the required comparison of price with cost does not invoke criteria otherwise used in competition cases and could force a competition authority or a court to act as a price regulator. Similarly, it is not clear when a price is unfair in itself.

The test set out in United Brands is not the only legal test for excessive pricing under Article 102(a). The CJEU has consistently recognized that excessive pricing can be established through a comparison of the prices charged by the dominant firm in a given EU member state with prices in other EU member states for the same product or service. In its recent

226. Exploitative excessive pricing refers to conduct by which the dominant firm exploits its market power vis-à-vis customers with which it does not compete. This needs to be distinguished from exclusionary excessive pricing, which refers to conduct by which the dominant firm aims to exclude its competitors. On this distinction, see, Massimo Motta & Alexandre De Streel, Excessive Pricing and Price Squeeze under EU Law, in EUROPEAN COMPETITION LAW ANNUAL 2003, WHAT IS AN ABUSE OF A DOMINANT POSITION? 91, 91 (Claus-Dieter Ehlermann & Isabela Atanasiu, eds., 2006).

227. Case 27/76, United Brands and United Brands Continental v. Comm’n, 1978 E.C.R. 207, ¶ 250, 252: “[i]n this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse. . . . The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.”

The judgment in AKKA/LAA, the CJEU confirmed the validity of this test and provided clarifications regarding its application. The court specified that a EU member state serving as a base for comparison must be selected in accordance with objective, appropriate, and verifiable criteria, which may include consumption habits and other economic and sociocultural factors that makes them comparable. In addition, a comparison must be made on a consistent basis, which entails, inter alia, the use of analogous calculation methods and, where living standards differ, of a purchasing power parity index. The AKKA/LAA judgment further held that, to be regarded as abusive, a geographic price difference must be appreciable, i.e., significant and lasting. Finally, an appreciable price difference is merely indicative of an abuse of a dominant position, which means that the price difference may be justified by objective reasons, in particular by the existence of objective dissimilarities across member states included in the comparison.

Notwithstanding the existence of the long-established case-law supporting an excessive pricing abuse, there have been relatively few cases of enforcement by competition authorities in the European Union based solely on excessive pricing. This applies particularly to the EC. Recent agency actions, however, appear to signal a reinvigoration of exploitative abuse enforcement in the European Union. So far, these cases primarily concern the European pharmaceutical industry and appear to focus on very substantial price hikes implemented in relation to off-patent drugs.

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230. Id. ¶¶ 40–42.
231. Id. ¶¶ 44–46.
232. Id. ¶¶ 55–56.
233. Id. ¶¶ 57–58.
235. The German competition authority recently found that Facebook’s data policy amounts to an exploitative abuse under § 19(1) of the German Act against Restraints of Competition. This is notable because it is not price-related. Bundeskartellamt, Facebook, Exploitative Business Terms.
At the level of the EC, this renewed enforcement interest is illustrated by the investigation opened in May 2017 into pricing practices implemented by Aspen Pharma. The EC announced that it was investigating allegations that Aspen Pharma imposed very significant and unjustified price increases for cancer medicines that it acquired after their patent protection had expired.  

Excessive pricing in the pharmaceutical industry also has recently come under scrutiny by national competition authorities. Some cases have led to infringement decisions, in particular in Italy against Aspen, in the United Kingdom against Pfizer and Flynn, and in Denmark against CD Pharma. These cases relate to very substantial price increases implemented for off-patent drugs. Other investigations are on-going, in


237. Press Release, Autorità Garante della Correnza e del Mercato, A480—Price Increases for Cancer Drugs Up to 1500%: the ICA Imposes a 5 Million Euro Fine on the Multinational Aspen (Oct. 14, 2016), http://en.agcm.it/en/media/detail?id=1c53b769-446d-4e36-bfed-49e2f7454e03. On July 26, 2017, the decision was upheld by a judgment of the Regional Administrative Court of Lazio, and an appeal is pending.


239. Press Release, Danish Competition and Consumer Authority, CD Pharma Has Abused its Dominant Position By Increasing Their Price By 2,000 Percent (Jan. 31, 2018), https://www.en.kfst.dk/nyheder/kfst/english/decisions/2018-cd-pharma-has-abused-its-dominant-position-by-increasing-their-price-by-2-000-percent. On Nov. 29, 2018, the decision was upheld by a judgment of the Danish Competition Appeals Tribunal. An appeal against that judgment is pending before the Danish Maritime and Commercial High Court.

240. ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, EXCESSIVE PRICING IN PHARMACEUTICAL MARKETS—NOTE BY THE
particular in the United Kingdom in relation to two cases involving respectively Advanz Pharma and Actavis (and its acquirers), as well as in the Netherlands and reportedly in Belgium in relation to cases involving Leadiant Biosciences.

A recent submission of the European Union to the OECD is noteworthy in that it outlines factors that EU competition authorities are likely to account for when determining whether intervention against excessive pricing is warranted. The submission emphasizes that enforcement may be particularly justified where market forces do not bring prices back to normal levels within a reasonable time period. It notes that high profits may be justified by risk taking, past investments or innovation and that, while the prohibition set out in Article 102(a) applies to all products and services, competition authorities have to factor investments and innovation into their assessment of unfairness and need to be mindful of the effect of an intervention on dynamic efficiency. The submission also highlights potential practical difficulties associated with enforcement against unfair prices, including those related to determining when a price is excessive, and indicates that, in some cases, regulation may be an alternative means to address persistently high prices.

A recent example is the Commission’s commitments decision in the Gazprom case, where the Commission found that Gazprom was

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245. See generally Case AT.39816 – Upstream gas supplies in Central and Eastern Europe (Gazprom), Commission Decision (May 24, 2018),
dominant in eight countries in Central and Eastern Europe, and abused its dominance by pursuing an overall strategy to partition gas markets along national borders. The Commission’s excessive pricing theory appears not to have formed the basis of the final decision: rather than deciding the issue, the Commission stated that “Gazprom may have pursued an unfair pricing policy by charging prices . . . that may have been excessive compared with Gazprom’s costs, as well as compared with other relevant competitive price benchmarks.”246 A decision on this theory was unnecessary, given that Gazprom had settled on other grounds, but it is notable that the Commission included the excessive pricing theory in its statement of objections and retained this discussion in its commitments decision.

2. Asia

Asian competition laws tend to be based on concerns about “fairness” rather than economic efficiency. An example is the notion of Zhengming advanced by Confucius, meaning “rectification of names,” which promotes social order and harmony by requiring big businesses to conduct themselves consistently with the attributes fairly implied from their names.247 Fairness might be considered more important under Zhengming than efficiency, e.g., in dealings between big businesses and small and medium-sized enterprises (SMEs) or final consumers.

Following the modernization of European competition law around 2004, which shifted the substantive aspects of European competition law toward the efficiency-based approach of U.S. antitrust policy,248 many Asian jurisdictions followed the global trend by introducing new antitrust legislation emphasizing economic analysis. In this process, bold attempts by governments to directly support SMEs or correct product pricing have encountered greater caution than before. But after the global financial crisis in 2008, this caution was overshadowed by social demands to protect

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246. Id. at ¶ 62 (emphasis added).
247. Zhengming suggests that, as provided in Book XIII of Confucius’s Analects, things should be made to accord with the implications attached to them by names. See Warren E. Steinkraus, Socrates, Confucius, and the Rectification of Names, 30 PHILOSOPHY EAST & WEST 261 (1980), https://www.jstor.org/stable/pdf/1398850.pdf?refreqid=excelsior%new_3A353d424402960e3f5c76190cfead97f9
SMEs, and consumers faced with mounting inequality problems. Benefiting SMEs and consumers is thus regarded as an important part of Asian competition law. Many developing Asian jurisdictions seem also to view the role of competition law as contributing to the economy from a macroeconomic policy standpoint as well. In sum, Asian competition law is expected to address a broader range of issues than in the United States or Europe.

Many Asian countries have provisions about excessive or unfair prices in their competition laws. The existence of former government monopolies that have benefitted from legal entry barriers could be a motivation for the regulation of excessive prices. It can be argued that government intervention in pricing in Asia tends to diminish as the economy develops and the self-correcting function of the market becomes more pronounced. Calls for antitrust intervention against excessive prices are heard when other government regulation is ineffective in ameliorating consumers’ difficulties. Despite the legal provisions and diverse goals, most Asian countries tend to respect the modern mandate of competition laws to promote market competition, and price regulation under competition laws is exceptional today.

There are various approaches in Asian competition enforcement to pricing issues. In the well-known example of the Qualcomm case, the authorities in China, Korea, Japan, and Taiwan showed notable differences in addressing similar issues. China tends to be more amenable to considering excessive pricing claims, while Japan, Korea, and Taiwan seem to be more cautious. In Qualcomm, The KFTC and TFTC approached the alleged excessiveness of SEP license fee rates with a theory of exclusion of competing chipset manufacturers. The JFTC concentrated on the downstream incentive for innovation by handset manufacturers. Asian jurisdictions appear to have a common concern, i.e.,

249. For example, Article 1 of China’s AML states that it is enacted for the purposes “of preventing and restraining monopolistic conduct, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of the socialist market economy.”


251. Id. at 50–51.
the high level of prices, but a wide spectrum of ways to apply their competition laws.\textsuperscript{252}

a. China

Article 17(1) of the Chinese Antimonopoly Law (AML) prohibits a dominant firm from “selling commodities at unfairly high prices or buying commodities at unfairly low prices.” Section 11 of the Provisions on Anti-Price Monopoly requires consideration of several factors including whether the price is remarkably higher or lower than other firms’ prices. It seems that the Chinese approach is significantly influenced by the European perspective. Despite the existence of explicit statutory provisions enabling enforcement against unfair pricing practices, pricing abuse cases have not been common.

Notable Chinese excessive pricing cases include Huawei v. Interdigital (2013) in the Guangdong Higher People’s Court, and the National Development and Reform Commission’s (NDRC)\textsuperscript{253} Qualcomm case (2015). In Qualcomm, the key issue was whether the firm abused its market dominance by breaching a “fair, reasonable, and non-discriminatory” (FRAND) commitment through tying SEPs and non-SEPs and imposing unreasonable conditions on patent licensing and chip sales.\textsuperscript{254} The NDRC found that Qualcomm abused its dominant position in wireless SEPs by charging unfairly high licensing fees, and by tying nonessential patents to SEPs. In addition, the NDRC found that Qualcomm also abused its dominant position in the baseband chip market by imposing unreasonable trading conditions on the sale of chips.\textsuperscript{255} The case was

\textsuperscript{252.} One commentator concludes that antitrust enforcers tend to look for conduct in addition to high prices in cases involving exploitation by intellectual property right holders and finds this approach common around the world including in the United States. He views the reason to be the administrative costs to challenge the excessiveness of prices. First, supra note 225, at 242.

\textsuperscript{253.} The NDRC was the agency responsible for enforcement against pricing abuses under the AML, before the three AML enforcement authorities were combined into the new State Administration for Market Regulation (SAMR) in 2018.


\textsuperscript{255.} For details of the case, see Wang Chunyan, Practice of Anti-Monopoly Law Relating to Intellectual Property Rights, in CHINA-KOREA IP & COMPETITION LAW ANNUAL REPORT 2015, at 109 (Meng Yanbei & Lee
settled in 2015 by the NDRC approval of Qualcomm’s rectification plan. It has been widely argued that one of the key motives for the case was to reduce the royalties Qualcomm collected from Chinese smartphone makers.\textsuperscript{256} One of the most significant findings by the NDRC was the violation of Article 17(1), and the rectification plan included applying SEPs royalty rates from 3.5 percent to 5 percent, using a royalty base of 65 percent of the net selling price of mobile phone devices instead of the existing base of 100 percent, which significantly reduced license fees.\textsuperscript{257} The NDRC has also actively pursued excessive pricing cases in the pharmaceutical sector, such as the Zhejiang Second Pharma/Tianjin Handewei Pharmaceutical cases (2017).

b. Korea

Korea’s Monopoly Regulation and Fair Trade Act (MRFTA) contains provisions addressing abusive pricing practices. Article 3-2(1) prohibits a dominant enterprise from committing “an act of determining, maintaining or changing unreasonably the prices of goods or services.” However, Article 5 of the Enforcement Decree of the MRFTA significantly reduces the prohibition’s scope to “significant increase or insignificant decrease in prices of goods or services relative to the change in the supply and demand or in the supply cost (ordinary level in general or similar business) without justifiable reason.” Public and political pressure to stabilize prices over the last decade, led to several attempts to revise the Enforcement Decree towards a more expansive prohibition; however, these were ultimately unsuccessful due to stiff resistance from business and academia.

Since the enactment of the MRFTA in 1980, the KFTC has enforced this prohibition twice.\textsuperscript{258} In 1992, the KFTC found that confectionery manufacturers’ reduction in size of their products amounted to a violation because the resulting effective price increase was 5.6-7.7 percent above

\textsuperscript{256} Lan Lan & Gao Yuan, \textit{High royalties key reason behind Qualcomm fine: NDRC, CHINA DAILY, Feb. 19, 2015,} \url{http://www.chinadaily.com.cn/bizchina/tech/2015-02/10/content_19542475.htm}.


\textsuperscript{258} See \textit{ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, POLICY ROUNDTABLES: EXCESSIVE PRICING} PDF p. 266 (n.3) (2011), \url{http://www.oecd.org/regreform/sectors/49604207.pdf}.
their cost increase. The 2001 case dealt with transaction fees by credit card companies, and the KFTC decision was overturned by the Korean Supreme Court. The Court found that multiple credit card companies that operated under a common credit card brand could not be considered as a single dominant market participant.

The KFTC has been very cautious about price regulation. The KFTC stated that price regulation by government “should be limited to industries in which natural monopoly is formed or legal (regulatory) barriers to the market are high,” and that enforcement faces major practical difficulties in determining a reasonable price level.

In the Qualcomm case (2017), the KFTC dealt with pricing issues within the paradigm of exclusionary abuse. The KFTC found that Qualcomm (1) refused to license mobile communications SEPs to rival modem chipset makers, (2) coerced handset makers to sign unfair license agreements linking chipset supply with patent license agreements, circumventing its FRAND commitment, and (3) offered a comprehensive portfolio license to handset makers and coerced them to make a royalty-free cross-grant of their own patents. While the KFTC’s case was based primarily on a theory of exclusionary conduct, it seemed that the excessive SEP licensing fees imposed on handset makers was one of the background harms that supported the findings. The KFTC refused to find an infringement based on unilateral price increases on sanitary pads by a market dominant manufacturer, despite strong public opinion against the manufacturer. Based on the limited cases to date, it appears that the KFTC may try to address excessive pricing through enforcement of traditional antitrust claims rather than intervening directly, which could be controversial.

c. Japan

261. Id. at 267 (footnote omitted).
262. See First, supra note 225, at 235.
No specific provision in Japan’s Antimonopoly Act (AMA) prohibits excessive pricing as an abuse of dominance, but excessive pricing in Japan could constitute a type of private monopolization defined and prohibited by Article 2(5) and Article 3 of the AMA, provided that the practice restrains competition substantially. While there has been no case of the kind reported so far, it does not necessarily mean that excessive pricing is not a concern of Japanese competition law.

The Japan Fair Trade Commission (JFTC) has been interested in excessive pricing issues regarding SEPs licensing practices. In 2009, the JFTC found that Qualcomm violated the AMA by (1) requiring Japanese handset manufacturers to grant Qualcomm royalty-free licenses to their patents, and (2) forbidding the Japanese manufacturers from asserting their patents against Qualcomm or Qualcomm’s customers. While the type of violation charged was not monopolization as specified in Article 3 of the AMA, but rather trading on restrictive terms as specified in Article 19 of the AMA, which is a type of unfair trade practice. The JFTC found that Qualcomm’s practices undermined handset manufacturers’ incentives to conduct research and development (R&D), strengthened Qualcomm’s dominant position, and impeded fair competition in the technology market. In March 2019, the JFTC took the highly unusual step of revoking the 2009 cease and desist order because it found no evidence to support the earlier findings about hampering fair competition and R&D. The case suggests, however, that the JFTC could be interested in price levels in the SEPs license fee rates context and would address them as traditional antitrust issues of innovation, applying both Article 3 about private monopolization and Article 19 about unfair trade practices.

d. Taiwan

Article 9(1)(ii) of Taiwan’s Fair Trade Act (TFTA), as amended in 2015, prohibits dominant companies from improperly setting, maintaining or changing the prices for goods or the remuneration for services. This
provision includes both predatory pricing and excessive pricing. The Taiwan Fair Trade Commission (TFTC) takes the view that price regulation is not the role of the agency. Therefore, the TFTC has found pricing infringements in only a few cases.

One of the rare cases was the Taiwan Stock Exchange Corporation and the Over-the-Counter Securities Exchange case in 2002. The TFTC found that the two firms abused their dominant positions by levying charges when no cost increase was involved. However, the Appeal and Petition Committee revoked the decision in 2003 on the grounds that the TFTC determined the remuneration for services inappropriately and a reasonable profit rate necessary to support the liability finding could not be set. Another example was the CD-R case in 2001 that dealt in part with the issue of excessively high royalties. The TFTC supported, in its initial decision, the allegation by CD-R licensees that a royalty rate reaching up to 17.8 percent was unreasonable and violated then Article 10(1)(ii) of the TFTA. However, the decision also was reversed by the administrative court on appeal.

In pursuing the Qualcomm case in 2018, which dealt with mobile telephone SEP licensing and chipset sales practices, the TFTC retraced the path of the KFTC’s Qualcomm decision (2017), in both its initial decision and the eventual settlement.

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267. Id. at 377.
268. Id. In another 2009 case that dealt with copyright license fees, the TFTC also stated that it is difficult to judge whether excessive pricing exists because pricing practices are highly subjective and negotiable. Id. at 378.
269. Disposition (90) Kung Ch’u Tzu No. 021 (TFTC original disposition); Supreme Administrative Court Judgment (98) Pan-Tzu No. 661; Supreme Administrative Court Judgment (98) Pan-Tzu No. 419; Supreme Administrative Court Judgment (98) Pan-Tzu No. 588.
270. The TFTC found that Qualcomm abused its monopolistic status in the baseband chips market by (1) refusing to license SEPs to other chipmakers, (2) further requesting agreements with unfair provisions, and (3) adopting a “no license, no chip” policy and offering an exclusive rebate to some cell phone companies. Press Release, TFTC, (Oct. 11, 2017), https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=179&docid=15247.
B. Abuse of Superior Bargaining Position

Another way some competition agencies regulate single-firm conduct is the rubric of “abuse of superior bargaining position” (ASBP). Typically, ASBP is not classified as an unfair trade practice rather than as an abuse of dominance.272 However, in countries actively enforcing ASBP laws, this type of provision, such as Bulgaria, Germany, Japan, and Korea, ASBP is a competition law violation.273 Korea is perhaps the most active ASBP enforcer with eighty-nine cases in 2017.274 Bulgaria enacted an ASBP provision in July 2015, and its competition authority imposed penalties in three cases.

France275 and Latvia276 have ASBP provisions enforced by their competition agencies. Vietnam, Laos, and Myanmar include unfair trade practice provisions in their competition laws, some of which cover practices that “would be assessed under abuse of dominance in other

272. In a 2008 International Competition Network report, Austria, France, Germany, Italy, Japan, Korea, and Slovak Republic reported that their laws contained specific provisions regarding abuse of superior bargaining position. The provisions were not part of the competition laws in Austria, France, Italy, and Slovak Republic. INTERNATIONAL COMPETITION NETWORK, TASK FORCE FOR ABUSE OF SUPERIOR BARGAINING POSITION, REPORT ON ABUSE OF SUPERIOR BARGAINING POSITION 6, 26–28 (2008), https://centrocedec.files.wordpress.com/2015/07/abuse-of-superior-bargaining-position-2008.pdf.

273. See ACT OF PROHIBITION OF PRIVATE MONOPOLIZATION AND MAINTENANCE OF FAIR TRADE (JAPAN AMA) § 14 of General Designation, arts. 19, 2(9); MONOPOLY REGULATION AND FAIR TRADE ACT (KOREA MRFTA) art. 23(1)(4); COMPETITION PROTECTION ACT (BULGARIA) art. 37a; ACT AGAINST RESTRAINTS OF COMPETITION (GERMANY ARC) §§ 20(1) & (2).

274. Unfair trade practices cases constituted 34 percent of all cases handled by the KFTC in 2017. KFTC, ANNUAL REPORT 2018, www.ftc.go.kr/solution/skin/doc.html?fn=27c47cd8bcebe3d3c6e9e99b1de523cf5d96b00bf9381971041931771714ae55cdb&rs=/fileupload/data/result/BBSMSTR_000000002404/.

275. C. COM. art. L 420-2 #2 (prohibiting the “abusive exploitation . . . of the condition of economic dependence in which a customer company or supplier finds itself vis-à-vis such company”).

jurisdictions.”

Similarly, in Taiwan, the Fair Trade Act provides that “no enterprise” can “impos[e] improper restrictions on its trading counterparts’ business activity as part of the requirements for trade engagement” or engage in “obviously unfair conduct that is able to affect [the] trading order.”

In other jurisdictions, the concept of superior bargaining position is reflected in the criteria for assessing dominance. For example, in Austria, a firm is “deemed to be dominant if it has a predominant market position in relation to its purchasers or suppliers; such position is, in particular, deemed to exist if such purchasers or suppliers depend on maintaining business relations in order to avoid serious economic disadvantages.”

Under China’s AML, the extent of reliance by other undertakings on the undertaking in question is a relevant factor in determining whether the undertaking is dominant. This is mirrored in the recently published draft Prohibition of Abuse of Market Dominance provisions (Article 7(4)), with more details on the factors for assessing reliance, including the volume and duration of dealings and difficulty of switching counterparties by the relying undertaking.

The remainder of this section focuses on the jurisdictions where ASBP is a violation of competition law.

1. Elements of ASBP

The elements of ASBP diverge sharply from those of abuse of dominance or monopolization. A key distinction between them is that “superior bargaining position” does not equate to monopoly power or dominance in the traditional sense. Another important difference is that ASBP enforcement often explicitly reflects the intention to regulate unfair, but not necessarily anticompetitive, conduct.

The common characteristics of “superior bargaining position” generally are (1) a contractual or pre-contractual transacting relationship between the parties (i.e., typically a vertical distribution relationship); and (2) one party’s commercial dependence on the other party, which places it

280. ANTIMONOPOLY LAW (CHINA) art. 18(4).
in a superior position. In determining whether counterparties are commercially dependent on the party in the superior position, competition agencies will consider the likelihood that the counterparty would face business difficulties if it could not transact with the party in the superior position. Dominance in the traditional legal sense is not a requirement, although market share, market position, and other indices of market power may be considered in determining whether a company has a superior bargaining position. In Japan, the relevant guidelines state that superior bargaining position does not require an enterprise to have a “market-dominant position,” but rather “only needs to have a relatively superior bargaining position as compared to the other transacting party.” At the same time, however, market position is listed as a relevant factor for consideration, along with degree of dependence of the counterparty, the possibility of the counterparty changing its business, and other concrete facts indicating the need for the counterparty to carry out transactions with the enterprise.

The German Bundeskartellamt has explained that the legislature, “when incorporating the [ASBP provision] into antitrust law in 1973, held the view that not only conduct by those undertakings holding a dominant position could distort competition. In fact, the conduct of undertakings, which were able to exercise market power only to a certain extent and in relation to certain undertakings was also deemed to be capable of having negative effects on competition.”

In many cases, “superior bargaining position” seems to be presumed on the basis of the type of enterprise and general industry conditions. In Bulgaria, Germany, Japan, and Korea, enforcers have brought several ASBP cases against retailers. Both Japan and Korea have specific ASBP provisions applicable to large-scale retailers, the existence of which seems

281. Unlike the German, Japanese, and Korean provisions, the applicable provision in France refers to “abuse of economic dependence.” C. COM. art. L 420-2 #2.
283. *Id.* § II.2; see also Namyang Dairy Products, KFTC Decision 2013-165 (Oct. 14, 2013) (noting Namyang’s position as the second largest enterpriser in the market for dairy products with 23 percent market share).
to presume that large-scale retailers hold superior bargaining positions relative to suppliers.\textsuperscript{285}

ASBP provisions typically target conduct within a distribution chain. Common types of abusive conduct under ASBP provisions include coerced sales or purchases, forced provision of benefits, changes in trading terms, unjustified terminations, and other requests outside the scope of ordinary business practices.\textsuperscript{286} The JFTC summarizes acts that are categorized as abuse of superior bargaining position as those committed “unjustly in light of normal business practices by making use of one’s superior bargaining position over the other party.”\textsuperscript{287} Both of those concepts, unjestness and comparison to normal business practices, are also reflected in ASBP provisions of Germany and Korea.\textsuperscript{288}

Key ASBP cases against retailers have involved forcing suppliers to accept the return of unsold products and to offset discounts from consideration to be paid to suppliers,\textsuperscript{289} forcing suppliers to dispatch their employees for free to work at retail stores,\textsuperscript{290} demanding preferential

\begin{itemize}
\item[285.] See JFTC, Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers (May 13, 2005), https://www.jftc.go.jp/en/legislation_gls/index_files/dsutp.pdf (defining “large-scale retailers” as retailers meeting certain revenue or floor space thresholds); Act on Fair Transactions in Large Franchise and Retail Business (Dec. 20, 2016), http://www.ftc.go.kr/solution/skin/doc.html?fn=cc7501e8e93e6b6fbeb5c3548f2beb4e63dca26b6e1111d65d58c648afa682a4&rs=/fileupload/data/result/BBSMSTR_000000002447/.
\item[287.] JFTC ASBP Guidelines, supra note 282, § I(2).
\item[288.] See KOREA MRFTA art. 23(1)(4) (“unfairly” taking advantage of dominant bargaining position); KFTC UTP Guidelines, § V(6) (abuse determined based on objective of the conduct at issue and ordinary course of trade in the industry, among other factors); Germany ARC, Art. 20 (impeding trading counterparties “in an unfair manner” “without objective justification”).
\item[289.] See Press Release, JFTC, Cease and Desist Order and Surcharge Payment Order against Toys ‘R’ Us-Japan Ltd. (Dec. 13, 2011).
\item[290.] See Press Release, JFTC, Cease and Desist Order against Yamada Denki Co., Ltd. (June 30, 2008); Press Release, JFTC, Cease and Desist Order and Surcharge Payment Order against EDION Corporation (Feb. 6, 2012).
\end{itemize}
rebates and financial contributions from suppliers,\textsuperscript{291} imposing costs on the supplier, blocking supplier products, and terminating a long-term commercial relationship with the supplier.\textsuperscript{292}

Notable ASBP cases against upstream suppliers have concerned forcing franchisees to bear costs of disposal of goods,\textsuperscript{293} forced purchases of products with imminent expiration dates or products that the distributors did not order,\textsuperscript{294} inclusion of patent nonassertion clauses in contracts,\textsuperscript{295} unjustified refusal to supply,\textsuperscript{296} and imposing new performance requirements mid-contract and then terminating.\textsuperscript{297}

In Germany, a court or agency will weigh a precisely defined objective justification for, or benefit from, the impugned conduct.\textsuperscript{298} Similarly, under the relevant guidelines in Korea, the KFTC will consider whether the conduct has reasonable grounds or will enhance efficiency or consumer welfare.\textsuperscript{299}

In general, there is no need for an enforcer to prove an actual negative effect on competition to support an ASBP claim. In Japan, there must be a


\textsuperscript{293}See Press Release, JFTC, Cease and Desist Order against Seven-Eleven Japan Co., Ltd. (June 22, 2009).


“tendency to impede fair competition” to support any unfair trade practices claim. The tendency to impede fair competition is considered on a case-by-case basis, considering factors including the degree of the disadvantage at issue and the extensiveness of the act, e.g., if the conduct imposes a disadvantage on a large number of transacting parties.300 In practice, however, the JFTC is likely to infer a tendency to impede fair competition if superior bargaining position and abusive conduct are found.301 Likewise, in Korea a “likelihood of impeding fair trade” could be shown to support any unfair trade practices claim.302 In general, though, the “likelihood of harming fair trade” can be inferred from unfairness of the means of competition, or unfairness of the substance of the transaction.303

It is difficult to get full clarity on the approach to the various elements of ASBP, as generally the decisions in these jurisdictions tend not to contain in-depth analyses, perhaps because they are civil law jurisdictions.

2. Underlying Rationales and Enforcement Trends

ASBP allows competition authorities to reach certain types of conduct and entities that they might not be able to reach under traditional competition law doctrines. Enforcement to date can be classified into a few categories: (1) unfair contractual terms (including changing of terms); (2) demands that are not consistent with industry norms and fall outside the contract; and (3) cases that look like traditional abuse of dominance or monopolization, but requisite elements (e.g., dominance) may not be satisfied. The first two categories seem to reflect a philosophy that ensuring fairness in business dealings is part of the mandate of a competition agency. Indeed, the competition agencies in Korea, Japan, and Taiwan are called “fair trade” commissions. In this sense, ASBP seems grounded in the legal concept of unconscionability, rather than abuse of market power.

The KFTC described the underlying rationale for ASBP enforcement in a response to an ICN questionnaire this way: “If the difference between bargaining positions of transaction parties is large enough to restrict free decision making of a party, and if one party takes advantage of this gap to put the other party at a disadvantage . . . fair transaction order is . . . disturbed.”304 It further explained that ASBP “requires examination of

300. JFTC ASBP Guidelines § I(1).
302. KOREA MRFTA art. 23(1)(4).
303. See KFTC UTP Guidelines art. V(6).
304. Id. at 15–16.
unfairness of individual transactions rather than of the entire market competition situation.\textsuperscript{305}

While the KFTC seems largely focused on fairness, the Japanese and German competition agencies link ASBP to competition. The JFTC has explained that ASBP “would impede transactions based on the free and independent[,] select[ion] of the said transacting party, and put the said transacting party in a disadvantageous competitive position against its competitors, while putting the party having superior bargaining position in an advantageous competitive position against its competitors. Since such act poses the risk of impeding fair competition, it is regulated under the Antimonopoly Act . . . .”\textsuperscript{306} The Bundeskartellamt likewise has pointed to the “negative effects on competition” of ASBP.\textsuperscript{307} The Bundeskartellamt explicitly stated that the ASBP provision “effectively widens the scope of the application of [abuse of dominance] with the effect that not only dominant but also such firms with a superior bargaining position are prohibited from unfairly hindering business partners which depend on them.”\textsuperscript{308} ASBP, thus, could be used as a basis to penalize abusive conduct when the elements of an abuse of dominance claim, such as dominance in a defined relevant market, might be difficult to establish.

Another underlying rationale for ASBP enforcement is the protection of SMEs. In its “Grand Design of Competition Policy,” the JFTC states one of its policy objectives is to “[p]romptly and stringently act against unfair trade practices that disadvantage [SMEs].”\textsuperscript{309} Indeed, it has argued that the JFTC’s ABSP enforcement has been directed exclusively to the protection of SMEs and that “damages to competition or consumer-welfare have never been examined by the JFTC in its SBP abuse regulation.”\textsuperscript{310} The JFTC has explained that changes to Japanese

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{305} Id. at 28.
\item \textsuperscript{306} JFTC ASBP Guidelines § I(1).
\item \textsuperscript{307} ICN Report on Abuse of Superior Bargaining Position, supra note 272, at 15.
\item \textsuperscript{308} Id. at 28.
\item \textsuperscript{309} JFTC, Grand Design of Competition Policy, \url{https://www.jftc.go.jp/en/policy_enforcement/index_files/grand_design.pdf}.
\end{enumerate}
\end{footnotesize}
competition law in 1956 made “abuse of superior bargaining position . . . [an] unfair trade practice[].”

The German Act on Restraints of Competition states that ASBP is intended to “apply to undertakings and associations of undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist (relative market power).”

Protection of small- and medium-sized enterprises has been a strong driver of Korean enforcement, including ASBP. In its 2018 annual report, the KFTC reiterated that it has been focused on “core agendas including fostering mutual cooperation between large companies and SMEs, [and] preventing abuse of economic power by large business groups.” Penalties for ASBP and other unfair trade practices have been increased.

Other industrial policy considerations may be reflected in ASBP enforcement. Many of the countries actively enforcing ASBP have sector-specific guidelines on ASBP. For example, both Japan and Korea have ASBP guidelines for large-scale retailers. ASBP enforcement may have appeal for countries with nascent competition law regimes, developing economies, or a high percentage of SMEs.

Going forward, it seems likely that ASBP provisions will be applied to new markets and multi-sided markets in which it may be difficult to establish dominance. The Japanese government, which recently concluded a study on digital platforms, has indicated that ASBP rules will play a key role in ensuring fair and free competition in digital markets.

Competition authorities in Austria, Germany, and Japan are investigating...
Amazon’s practices with respect to its online marketplace. In each case it appears that the authority is alleging ASBP or ASBP-like claims.\(^\text{316}\)

VII. INTERNATIONAL LANDSCAPE

A. Growth of Competition Enforcement

Competition laws have proliferated dramatically over the past 30 years, in developed and developing countries alike. As of 2016, 134 countries and seven regional organizations, together with four sub-national groups, had adopted competition law regimes.\(^\text{317}\)

Laws closely resembling existing antitrust statutes date back to the late 19th Century, when Canada and the United States adopted antitrust laws in response to industrialization and the rise of large corporations. After World War II, Germany, Japan, and the United Kingdom adopted competition laws as part of post-war reconstruction. A major development in the global adoption of competition legislation took place in 1957, when the six member countries of the European Coal and Steel Community established the EEC through the adoption of the Treaty of Rome. The Treaty contained competition provisions. Building on foundations laid in the 1951 Treaty of Paris, the Treaty of Rome sought to promote competition in the ordinary sense, but it explicitly had a more important goal: encouraging the free flow of goods, labor, and capital across European borders, seen as necessary to effectuate the European Single Market. As the EEC and, later, its heir the European Union, grew, the spread of competition law grew with it. In a 1995 white paper, the EC included competition law as one of the essential measures to be adopted.


by candidate countries before ascension into the community.\footnote{318}{White Paper, Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union §§ 2.27–29 (COM(95)163, May 3, 1995).} By 2004, the EC decentralized certain aspects of enforcing competition law to national competition authorities.\footnote{319}{Council Regulation 1/2003, 2003 O.J. (L 1) 1, 9.} The EC eventually began to insist that jurisdictions with which it established trade agreements establish similar legislation.\footnote{320}{Some EU trade treaties specifically required laws on abuse of dominance. \textit{See} PHILIPPE BRUSICK, ANA MARÍA ALVAREZ \& LUCIAN CERNAT, EDs., \textit{COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS} 25–26, 89–107 (UNCTAD 2005), \url{https://unctad.org/en/Docs/ditcclp20051_en.pdf}.} Parallel measures also have been established in the European Free Trade Association, which consists of non-EU member states, most of which are now parties to the Agreement on the European Economic Area.

From the 1950s to the 1970s, a handful of nations outside of Europe, also adopted competition laws. Argentina, Chile, and Korea passed antitrust legislation during this period. Chile’s law, for example, was introduced by the military regime in the 1970s after a group of University of Chicago-trained economists were invited to help reform the economy. During this period, India and Pakistan passed legislation banning monopolies and restrictive trade practices, although both laws were eventually replaced by more effective modern competition laws.

The pace of adoption increased dramatically after 1990. Since 1990, seventy-eight additional countries adopted competition laws. Most complemented their new laws with enforcement institutions. Two parallel events led to the adoption of competition legislation in another wave of countries in the 1990s. After the fall of the Soviet Union, almost all former Eastern Block nations adopted competition laws, led by the Russian Federation and countries such as Poland, Hungary, and what became Czechia and Slovakia. At the same time, policy leaders in Latin America recognized that the economic effects of state-sponsored domination of the economy had restrained their nations’ economic growth, and Brazil, Colombia, Mexico, Peru, and Venezuela established competition laws. Competition laws in these countries were seen as essential tools for facilitating the transition from planned to market economies.

External pressure has contributed to domestic adoption of competition laws in recent decades. The World Bank and the International Monetary Fund made the passage of competition laws a condition of many loan
packages. The effectiveness of antitrust regimes imposed as a condition of loan requirements, rather than as a product of domestic consensus, however, proved to be limited.

The most recent competition law adoption phase dates from the 2000s. Highlights of this period include the adoption by China of its AML, the upgrading of existing competition legislation in Latin America, Africa, the Indian subcontinent, and the adoption of new legislation in most of the countries that had sat out the earlier adoption, including countries as diverse as Iran, Vietnam, and Saudi Arabia.

As of the date of this Report, nearly all countries have competition laws; notable exceptions include Bolivia, Cuba, Guatemala, North Korea, and Turkmenistan.

**B. Current Landscape**

In their recent study comparing the relative influence of the United States and the European Union over the world’s competition laws, Anu Bradford et al. found that the European abuse-of-dominance model has been widely adopted and the authors advanced reasons for that. They include “push factors” such as the European Union’s active “exportation” of its antitrust regulations through myriad trade, association, and other political agreements in which treaty-partners are required to adopt an EU-style antitrust law in return for obtaining greater market access or closer political association with the European Union. Bradford et al. also identify influential “pull factors,” such as (1) domestic politics that are more conducive to EU-style antitrust laws, under the theory that the EU approach accommodates more diverse policy goals, defers less to market forces, and place more confidence in governments’ perceived ability to address market failures; (2) the European Union’s tendency to promulgate more precise and detailed rules and guidelines (available in multiple languages) that are easier to copy than the U.S. minimalist statutory structure, which is fleshed out by a century of case law; and (3) the compatibility of EU law with European-style governmental systems.

323. The U.S. approach also may be perceived by many around the world as too noninterventionist and tilted too much towards a free market philosophy. The U.S. aversion to regulation and intervention appears to set it apart from the vast majority of other countries.
Another reason is “The Brussels Effect,”324 which posits that in the European Union there is a greater ability to shape foreign jurisdictions’ laws given that companies often apply the most stringent regulatory standard—which typically is perceived to be the EU standard—across their global operations, in order to capture the benefits of uniform production and business practices while maintaining compliance worldwide.

The many jurisdictions with new and emerging competition law enforcement systems appear to pay close attention to both the United States and European Union’s court and agency decisions in dominance cases, although some diverge significantly from both. No country appears to be blazing its own unique path.

VIII. DOMINANCE ENFORCEMENT IN SEVEN SELECTED COUNTRIES

A. Australia

In Australia the main antitrust law is the Competition and Consumer Act of 2010 (CCA). In 2017, the Australian Parliament substantially amended the CCA’s abuse of dominance provision, Section 46. It now prohibits a firm with a “substantial degree of market power” from engaging in “conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition.” The Australian Competition and Consumer Commission (ACCC), which enforces the CCA, has issued “Guidelines on Misuse of Market Power” to explain how it interprets and enforces the new law.325

The Guidelines articulate neither a conceptual nor a quantitative test for when market power is deemed substantial, but the Guidelines suggest a low bar by asserting that more than one firm in a market can possess substantial market power.326 The CCA does not define “substantially lessen competition,” but the Guidelines indicate that the ACCC understands Section 46 to prohibit conduct such that “the competitive process is compromised or impacted” in a meaningful way, which “does not require an impact on the whole market.”327 The Guidelines also

327. Id. §§ 2.25–28.
articulate types of conduct that can be found in violation of Section 46, including refusals to deal, “restricting access to an essential input,” predatory pricing, loyalty rebates, margin squeeze, tying, and bundling.\textsuperscript{328} In this regard, the ACCC’s enforcement of Section 46 appears to resemble EU enforcement of Article 102 much more than the United States’ enforcement of Section 2. The Guidelines also articulate conduct “not likely” to violate Section 46, including innovation, efficient cost cutting, and matching prices without going below cost.\textsuperscript{329}

A breach of Section 46 (as it then stood) was found by the High Court in \textit{NT Power Generation v. Power and Water Authority}.\textsuperscript{330} The Power and Water Authority (PAWA) was a statutory body that owned the majority of the electricity transmission and distribution network in the Northern Territory. It also generated and purchased electricity sold to consumers through its own infrastructure. NT Power was a private enterprise that generated electricity at its own power plant. It requested access to PAWA’s infrastructure in order to distribute and sell its power in competition with PAWA. PAWA refused. The High Court found that PAWA took advantage of its power in the market. The absence of other suppliers meant that PAWA could, in a commercial sense, withhold access to its infrastructure. The High Court also found that it took advantage of its market power for the purpose of injuring NT power as a competitor.

The Task Force is aware of no significant enforcement actions under the current version of Section 46.

\textbf{B. Brazil}

The Administrative Council for Economic Defense (CADE) is responsible for enforcing Brazil’s competition law. Under the 2011 Competition Act,\textsuperscript{331} a company may be liable for abusing its dominant position by engaging in refusals to deal, predatory pricing, tying, price discrimination, exclusivity agreements, resale price maintenance, and other conduct. A dominant position is presumed if a company is able unilaterally to alter market conditions.\textsuperscript{332} A dominant position also is presumed when a company holds a share of 20 percent or more in the relevant market. The presumption of dominance is rebuttable, and CADE often considers other market conditions such as barriers to entry, observed

\begin{itemize}
\item \textsuperscript{328} \textit{Id.} § 3.
\item \textsuperscript{329} \textit{Id.} § 4.
\item \textsuperscript{330} NT Power Generation Pty Ltd. v. Power and Water Authority, 219 CLR 90 (2004).
\item \textsuperscript{331} Law No. 12,529/2011.
\item \textsuperscript{332} \textit{Id.}, art. 36, § 2.
\end{itemize}
rivalry, and customers’ buying power, to determine whether a firm holds a dominant position. Nevertheless, it is possible in Brazil to have multiple dominant firms in a single relevant market.

A firm accused of abuse of a dominant position may assert the affirmative defenses of lack of exclusionary or abusive intent, lack of anticompetitive effects, or existence of efficiencies resulting from the conduct. If the firm can persuade CADE that efficiency gains of its conduct outweigh anticompetitive effects, the agency may determine that the conduct is lawful. This was the result in Brazil’s investigation of Google’s Shopping service. A Brazilian company that owned two comparison shopping sites filed a complaint with CADE against Google, alleging that Google abused its dominance in general search by biasing its search results in favor of Google’s own service, Google Shopping. CADE accepted the characterization of Google as dominant in general search but found no abuse because it found both that Google’s practices (such as providing product search results that linked directly to retailers, not comparison shopping sites) provided benefits to consumers, and no actual anticompetitive effects had been shown.

CADE had two previous significant product design investigations, both against Ambev, which was alleged to hold a dominant position in beer manufacturing and distribution in Brazil. In the first, CADE investigated Ambev’s introduction of a 630 ml beer bottle similar to the standard 600 ml bottle used by market rivals. Ambev’s new bottles allegedly caused confusion in the recycling processes, raising costs for retailers that sold both Ambev’s and its competitors’ products, and potentially causing retailers to stop selling the competitors’ products. CADE was not convinced that Ambev had good business reasons for the new 630 ml size. Ambev entered into a settlement agreement with CADE in 2010, in which the company committed to cease the use of 630 ml bottles.

In the second investigation, CADE examined Ambev’s launch

333. See Case 08012.010483/2011-94 (Claimant: E-Commerce Media Group Informação e Tecnologia Ltda.; Respondent: Google Inc. and Google Brasil Internet Ltda.). The complaint was first filed in 2011 as a pure product-related search bias complaint; it later grew to encompass Google Shopping, a service that was launched in 2012.

334. Id. CADE formally closed the investigation in June 2019. See Google Inc. e Google Brazil Internet Ltda, Processo no. 0812.010483/2011-94 (Conselho Administrativo de Defesa Econômica, July 1, 2019).

of 1000 ml reusable bottles. The initial concern was similar to that raised as to the 630 ml bottles; however, in 2012 CADE concluded that the introduction of the 1000 ml bottles had a legitimate business justification (they were reusable rather than merely recyclable), did not raise rivals’ costs, and was beneficial for consumers.\textsuperscript{336}

The difference in the two Ambev investigations appears to be the strength of the affirmative business justifications. Although CADE has never dismissed an abuse of dominance complaint by relying exclusively on the argument that an anticompetitive practice was justified by efficiency gains, efficiency arguments play an important role in its dominance decisions.\textsuperscript{337}

The so-called Zero-Rating case illustrates how Brazilian enforcers may entertain novel theories for investigation, but ultimately tend to decide cases similarly to U.S. and EU enforcers. CADE investigated internet service providers Claro, Tim, Oi, and Telefonica for alleged discriminatory practices of charging their respective customers with zero or reduced costs when accessing certain social media apps such as Facebook and WhatsApp, but not extending the same treatment to competitors’ apps. According to the complaint,\textsuperscript{338} such practices had a tendency to strengthen the dominant position held by Facebook and WhatsApp, and to prevent smaller players and new entrants from competing on equal terms. CADE dismissed the case because it found no causal connection between zero-rating and the success of incumbents. CADE found that consumers would use social media apps with the same intensity regardless of zero-rating offers. Further, zero or reduced costs for data could lead to various consumer benefits.\textsuperscript{339}

Brazilian law is similar to U.S. and EU law in its use of a “power + conduct” paradigm. CADE has undertaken an in-depth analysis of some types of conduct in the context of dominance. For example, CADE


\textsuperscript{337} See also Case 08700.008318/2016-29 (Respondent: Uber). CADE considered the efficiencies represented by Uber’s entry, as evidenced by the decision of CADE’s Department of Economics (DEE) to dismiss the preliminary investigation.

\textsuperscript{338} Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados, Dominance in Brazil.

\textsuperscript{339} DOLMANS & MOSTYN, THE DOMINANCE AND MONOPOLIES REVIEW at 64.
conducted an in-depth analysis in the excessive pricing case Figueroa Campos v. White Martins, and declined to recognize excessive pricing as a stand-alone abuse\(^340\); in the resale price maintenance case SKF do Brasil Ltda., prohibiting resale price maintenance on the grounds that the defendant was permitted to attempt to prove, but had not proved, efficiency benefits of the conduct\(^341\); and in the refusal to deal case Petrobras, stating that while refusal of access to natural gas pipelines could support an investigation of abuse of dominance, liability under the specific facts was not warranted due to concerns about deterring the defendant’s investment in capital-intensive facilities.\(^342\) In some cases, Brazil’s dominance standards were aligned more closely with those of the United States, and in others, with those of the European Union.

**C. China**

Abuse of dominance is prohibited in China by the AML,\(^343\) which came into effect in August 2008. Article 17 of the AML prohibits a dominant firm from engaging in excessive pricing, predatory pricing, refusal to deal, tying, bundling, imposing unreasonable conditions, discriminatory treatment of trading counterparties with equal standing, and other abusive conduct determined by the antimonopoly authorities, without justification.\(^344\) Article 6 of the AML more generally prohibits the abuse of a dominant market position that eliminates or restricts competition. The State Administration for Market Regulation (SAMR) has been responsible for enforcing the AML with respect to dominance issues since April 2018. Prior to that time, the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) were responsible (SAIC merged into SAMR; NDRC continues in existence but without antitrust powers).

\(^341\). Case 08012.001271/2001-44.
\(^342\). Acesso ao gasoduto Bolívia-Brasil e cláusula de exclusividade (Petrobras), Case 08012.002692/2002-73. The defendant, a division of Petrobras, was accused of refusing rivals access to its gas pipelines, despite having capacity on the lines. Petrobras successfully argued that it needed to preserve the capacity for more lucrative contracts, in order to recoup investments.
\(^344\). *Id.* at Art. 17.
In China, a dominant position is presumed under Article 19 of the AML when a company holds a market share of 50 percent or more. As provided in Article 18 of the AML, SAMR considers many factors in determining market dominance, including market shares, control over upstream and downstream markets, financial strength, other firms’ dependence on the company, and barriers to entry in the market. In addition to providing business justifications, respondents in abuse of dominance cases can raise affirmative defenses and dispute claims of market dominance by arguing for broader relevant product markets, that the respondent lacks the market power necessary to cause anticompetitive harm, and that the conduct has not resulted in any anticompetitive effects.

Investigations of Tetra Pak and Qualcomm by predecessor agencies may provide examples of how SAMR may enforce the AML against abuse of dominance. In 2016, SAIC found that Tetra Pak had abused its dominant position in the markets for equipment, technical services, and packaging material for paper-based composite aseptic packaging of liquid food. Tetra Pak was found to have harmed competition without justifiable reason through bundling, exclusive dealing, and loyalty discounts. SAIC found that Tetra Pak’s bundling requirements infringed Article 17.5 of the AML because there was no valid reason to force users to use its packaging material exclusively for the normal operation of Tetra Pak’s packaging equipment and maintenance services. Tetra Pak’s exclusive dealing provisions infringed Art. 17.4 because it required Hua Xin Packaging Co. (the only Chinese company capable of supplying “Kraft back paper”) to supply it exclusively. Tetra Pak’s loyalty discounts infringed Art. 17.7 because they induced customers to purchase more than they would have absent the rebates, and because Tetra Pak leveraged demand in the equipment and service markets to harm competition in the packaging material market. SAIC imposed a record penalty (U.S. $97 million) for abuse of a dominant position pursuant to Article 17 of the AML. It was the first case that applied the catch-all provision of Art. 17.7, which gives Chinese agencies wide discretion to target conduct not expressly mentioned in Art. 17.

In 2015, the NDRC found that Qualcomm had abused its dominant position by engaging in various types of conduct that allowed it to charge unfairly high royalties on certain Standard Essential Patents (SEPs), tying the licensing of SEPs and non-SEPs, and imposing unreasonable conditions on the sales of its baseband chips. The NDRC defined a licensing market for each SEP as well as a market for baseband chips, concluding that Qualcomm held 100 percent of the SEP licensing markets and more than 50 percent of the baseband chip market. The NDRC also
considered Qualcomm’s ability to control the relevant market, major smartphone manufacturers’ dependence on Qualcomm, and barriers to entry. The NDRC rejected Qualcomm’s justifications that the conduct at issue was a business norm as well as that it was implemented to mitigate litigation risks, among other arguments. The NDRC fined Qualcomm 8 percent of its 2013 revenue in China (roughly U.S. $975 million) and ordered Qualcomm to rectify its anticompetitive practices.345

Based on NDRC and SAIC’s enforcement history, as well as the text of the AML, SAMR’s enforcement of the AML is likely to share many common elements with both EU and U.S. competition laws.

D. India

The Indian Competition Act of 2002, at Section 4, prohibits the abuse of a dominant position in a relevant market by an enterprise or person.346 Dominant position is defined as a position of strength enjoyed by an enterprise in the relevant market, which enables the enterprise to operate independently of the competitive forces prevailing in the relevant market, or to affect its competitors or consumers or the relevant market in its favor.347 The Competition Commission of India (CCI) in 2002 published a short Advocacy Booklet: Provisions Relating to Abuse of Dominance,348 which listed ten factors used to determine dominance, nine of which would be familiar to a U.S. or EU lawyer,349 and only one of which—“social costs and obligations and contribution of enterprise enjoying dominant position to economic development”—would not;350 this factor is taken from Section 19(4) of the act. The Advocacy Booklet highlights three types of

345. See generally H. Stephen Harris, An Overview of the NDRC Decision in the Qualcomm Investigation, CPI ANTITRUST CHRONICLE, July 2015.
347. Id. at § 4(a).
349. Id. at 6-7; the nine are market share; size and resources of the enterprise; size and importance of competitors; economic power of the enterprise; vertical integration; dependence of consumers on the enterprise; extent of entry and exit barriers in the market; countervailing buying power; and market structure and size of the market.
350. This factor is meant to help the CCI protect consumers from exploitative abuses. See DLF Ltd. v. CCI Appeal No. 20 & 23 (2011).
offenses that are infrequently prosecuted in the United States and European Union: predatory pricing, for which the CCI uses a mainstream definition but without a likely-recoupment element;\textsuperscript{351} essential facilities;\textsuperscript{352} and abuses involving intellectual property rights.\textsuperscript{353} The enumeration of specific kinds of abusive conduct in Section 4 of the act is exhaustive,\textsuperscript{354} rather than illustrative.

Excessive pricing as an exploitative abuse is not defined in the act itself. Section 4, however, uses the term “unfair” as to prices, which the CCI has interpreted as meaning unfairly high or low prices. Under this provision, the CCI found liability against the National Stock Exchange of India for offering zero-priced trades for securities, on the grounds that this undercut competing stock exchanges.\textsuperscript{355}

The CCI traditionally resorted to forms-based approaches to abuse of dominance claims\textsuperscript{356} and brought such claims as per se violations, but these approaches appear to be changing. Although the CCI has not yet fully adopted an effects-based approach, it now often takes into consideration the possible procompetitive effects of a dominant firm’s conduct.\textsuperscript{357}

Although dominance is not by itself a violation of the act, several recent cases have construed broadly the act’s prohibition of abuse, for example recognizing that the CCI may find abuse where the dominant enterprise is not a competitor of the complaining party,\textsuperscript{358} and may demand that a dominant firm observe a “special responsibility” to ensure “fair and open” market access to competitors.\textsuperscript{359} India does not stipulate a specific percentage threshold as a rebuttable presumption of dominance.\textsuperscript{360}

\textsuperscript{351} Id. at 9.
\textsuperscript{352} Id. at 10.
\textsuperscript{353} Id. at 11.
\textsuperscript{354} See Fast Track Call Cab Ltd. v. ANI Technologies Ltd., Case No. 6 and 74 (2015) (“Fast Track”).
\textsuperscript{357} See Fast Track.
\textsuperscript{359} See Matrimony.com Ltd. v. Google LLC, Case Nos. 07 and 30 (2012).
\textsuperscript{360} Fast Track. To that extent, § 4 of the Act diverges from the broad generality of monopolization in § 2 of the Sherman Act.
E. Israel

Israel’s main competition law is the Economic Competition Law (ECL), known until recently as the Restrictive Trade Practices Law (RTPL). The law’s dominance provision is Section 29A, which was adapted from EU Article 102. Extensive amendments to fundamental provisions of the RTPL took effect in January 2019, which, inter alia, renamed Israel’s competition law the ECL, renamed Israel’s enforcement agency the Israel Competition Authority (ICA), and strengthened the ICA’s enforcement tools.

Prior to the amendment, only firms with greater than a 50 percent market share in a relevant market would be deemed monopolies and subjected to the prohibitions of Section 29A. The definition of monopoly now captures entities with “significant market power,” in addition to those with greater than a 50 percent share. In February 2019, the ICA released a draft guidance paper stating that “significant market power is the power to charge a price that is significantly higher than the price that would be charged in a competitive market.” The guidance paper lists factors to be assessed when determining market power, including market share, the company’s conduct, entry barriers, and whether products are differentiated.

Following public hearings and consultations, the ICA issued revised guidelines on excessive pricing in February 2017 narrowing enforcement and indicating enforcement against such conduct will take place only in exceptional circumstances and as a last resort. According to the


363. See id. at 30 n.35.


365. Public Statement 1/17: The Antitrust Director General’s Considerations while Enforcing the Prohibition Against Unfairly High Prices (Feb. 28, 2017).
guidelines, the ICA will not (1) intervene in excessive pricing matters if there is already a specific industry regulator in the market; and (2) will not impose fines for excessive pricing if there are other available structural remedies, such as eliminating barriers to market entry. The ICA more recently has identified criteria for assessing the appropriateness of intervening against excessive prices:  

1. a regulator with authority over the prices must not exist;
2. alternative remedies that makes the market more competitive must be unavailable; and
3. prices must be unfair in that the monopoly is powerful and the consumer lacks bargaining power.

There are currently no excessive pricing investigations pending.

F. Mexico

Mexico’s main antitrust law is the Federal Law on Economic Competition (FLEC). The Federal Commission on Economic Competition (COFECE) enforces the FLEC, except in the sector regulated by the Federal Telecommunications Institute. The FLEC lists specific “relative monopolistic practices” that may be illegal if committed by an undertaking possessing market power in a relevant market. To impose liability, COFECE must establish that the company possessing market power in the relevant market engaged in a specified practice with the intent or effect of harming competition, and that the anticompetitive effects are not outweighed by the efficiencies proven by the company.


368. These include exclusive dealing, resale price maintenance, tying, refusal to deal, boycott, predatory pricing, cross-subsidization, price discrimination, margin squeeze, and monopolizing essential facilities.

369. This includes exclusive dealing, resale price management, tying, refusal to deal, boycott, predatory pricing, cross-subsidizing, discriminatory pricing, margin squeezing and monopolization of essential facilities. As these relative monopolistic practices are codified in the FLEC, COFECE must prove that the conduct at issue squarely fits the applicable definition.

COFECE generally considers a sustained market share of 50 percent or greater to be indicative of market power. An undertaking cannot be liable for abuse of dominance through conduct not specifically listed in the statute, but such conduct can be considered for other purposes. For example, excessive pricing is not itself punishable, but sustained high margins have in the past been considered by COFECE as prima facie evidence of market power.

The FLEC’s methodological framework—with its power + conduct approach and focus on effects—is patterned after U.S. law and broadly similar to the modern EU approach. The FLEC, however, gives COFECE powers greater than its U.S. and EU counterparts. COFECE is empowered to study markets where it suspects barriers to competition exist, essential facilities require regulation, or a lack of effective competition exist. If COFECE can prove the existence of one of these conditions, it may impose remedies even if no separate violation of the antitrust laws has occurred.

F. South Africa

Under South African law, conduct by dominant firms is governed by Sections 8 and 9 of the Competition Act of 1998. Section 8 covers abuse of dominance; Section 9 prohibits price discrimination by dominant firms. The South African Competition Commission (SACC) is responsible for investigating and prosecuting alleged abuse of dominance cases, which are adjudicated before the Competition Tribunal. The Competition Tribunal’s decision may be appealed to the Competition Appeal Court (CAC).

Sections 8(a) and 8(b) prohibit a dominant firm from charging an excessive price to the detriment of consumers or from refusing competitor access to an essential facility. Two excessive pricing cases under Section 8(a) have come before the CAC, and in each, the appeals court outlined a quantitative analysis of whether the price charged is “reasonably related to the economic value of the product.”

Section 8(d) of the Competition Act enumerates types of exclusionary conduct, including predatory pricing, refusals to deal, and bundling and tying, that are prohibited unless the dominant firm can show that the procompetitive benefits outweigh the anticompetitive effects. Section 8(c)


371. See Mittal Steel South Africa Limited, Macsteel International BV, Macsteel Holdings (Pty) Limited v. Harmony Gold Mining Company Limited, Durban Roodepoort Deep Limited, Case No. 70/CAC/Apr07 (May 29, 2009); and Sasol Chemical Industries v. Competition Comm’n, Case No. 131/CAC/Jun14, ¶ 162 (June 17, 2015).
is a catch-all provision prohibiting any other types of exclusionary conduct under an effects-based standard.

One notable divergence from EU and U.S. dominance law is that, under the South African Competition Act, a firm is deemed irrefutably dominant if it has a market share in excess of 45%, and is rebuttably presumed to be dominant if it has a market share in excess of 35%. The South African law also is more aggressive in condemning exclusionary restraints that substantially prevent or impede small firms from engaging or expanding in relevant commerce.\textsuperscript{372} Economies faced with the challenges of development, particularly South Africa, have seen the need to expand the scope of exclusionary restraints and have incorporated the value of inclusiveness in their abuse of dominance law.\textsuperscript{373}

South Africa signed into law comprehensive amendments to the Competition Act in February 2019.\textsuperscript{374} These amendments have yet to be implemented, but they will expand the enumerated list of conduct deemed to be exclusionary abuses and lower SACC’s burden of proof in abuse of dominance cases.


\textsuperscript{373} See generally Eleanor M. Fox, Mor Bakhoum, Making Markets Work for Africa (Oxford University Press 2019).

\textsuperscript{374} See Competition Amendment Act, 18 of 2018, 644 Government Gazette No. 42231 (Feb. 13, 2019).
ANNEX 1: SUMMARY OF THE DDTF SEMINARS AND PANELS

A. Brussels, Belgium GSS, December 11, 2017

The Brussels GSS consisted of two panels. The first on “Intel – a Case of Convergence, or Still a Difference about ‘Effects?,’” was moderated by Jürgen Schindler and featured panelists Andrea Coscelli, Eleanor Fox, Luc Guyselen, and Ali Nikpay. It considered the EC’s decision against Intel for abusive loyalty rebate practices in 2009, the FTC’s settlement with Intel as to the same conduct in 2010, and the September 2017 decision of the CJEU in the EC’s case, which remanded the case to the General Court and held that where evidence is put forward by a dominant company that its conduct in fact could not foreclose competition, the EC is required to examine that evidence and the General Court is required to assess it. Panelists noted that although the FTC and EC both found liability against Intel, the EC’s case went much further, and the EC—although it reviewed effects during its investigation—did not rely on effects in court, in contrast to the FTC’s approach. Panelists noted that the CJEU’s decision was the first time that the CJEU had mandated “effects-based” analysis. In panelists’ views, an increased focus by EC enforcers on competitive effects, reduced use of characterizing conduct as “restriction by object” (and therefore essentially automatically illegal), and greater attention to defendants’ efficiency defenses all would be welcome, and seem likely in the wake of the CJEU decision. It was too early, however, to report whether these would occur.

375. Jurgen Schindler is a partner at Allen & Overy LLP. Andrea Coscelli is Chief Executive, U.K. Competition & Markets Authority. Eleanor Fox is Professor of Law, New York University School of Law. Luc Guyselen is a partner, Arnold & Porter Kaye Scholer LLP. Ali Nikpay is a partner, Gibson Dunn & Crutcher LLP.


In discussing what made the U.S. approach different from the historical approach of the EC, panelists mentioned their perception that U.S. courts give less deference to U.S. enforcers than EU courts give to EC enforcers, which affects how much each set of enforcers is likely to demand. While panelists were unanimous that a greater focus by the EC on effects would be welcome, they differed about whether EC courts should be as skeptical about effects as their U.S. counterparts. In the view of some panelists, it was not clear that U.S. courts always understand more complex (but still correct) theories of competitive harm.

The panel on “The Role of Innovation” was moderated by Hill Wellford and featured panelists Cristina Caffarra, Thomas Graf, and Renata Hesse. It considered the EC and U.S. cases against Microsoft and Google, as well as older cases on refusals to deal and compulsory access such as *Decca Navigator*. The panelists noted that the United States seems to be skeptical of the concept of “predatory product innovation” while the EC seems to embrace it, and that U.S. and EC courts and enforcers appear to have differing levels of confidence in “economic dynamism,” the typical lifespan of technological advantages, and the ability of markets to self-correct. Like the first panel, the second panel examined differences in the U.S. and EC enforcers’ investigatory approaches to effects and efficiencies, and were unable to predict changes to the approach (if any) that the EC might implement in response to the CJEU’s *Intel* decision.

After each panel, the panelists and audience members divided into several tables for face-to-face discussion of the topics, then reported back to the group as a whole. The reports largely paralleled the panelists’ discussion. For example, the audience generally agreed that a U.S.-EC divergence exists with respect to both topics, and welcomed what participants assumed would be a greater EC focus on effects post-*Intel*. Of interest, however, was that European-based attendees were much less concerned with the concept of divergence itself—the degree to which the United States and EC differ—than whether EC enforcement is correct, how it is developing, and in particular whether it is predictable. A majority of participants (largely consisting of private lawyers) believed that currently, there is a “predictability gap”—meaning that it is more difficult

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379. Hill Wellford is a partner at Vinson & Elkins LLP. Cristina Caffarra is an Economist at CRA International Inc. Thomas Graf is a partner at Cleary Gottlieb Steen & Hamilton LLP. Renata Hesse is a partner at Sullivan & Cromwell LLP.

to counsel powerful firms in the EU than in the United States, because EC enforcers’ condemnation of dominant firms’ conduct is less predictable than that of U.S. enforcers. Participants who believed such a “gap” existed also believed that it was due in large part to an inability to predict ex ante what efficiencies EC enforcers would credit, and what conduct would be deemed restriction by object. Participants were sharply divided about the likely effect of the CJEU’s Intel decision; some predicted that the EC would change its approach, while others predicted no change, noting that EC enforcers have stated that their investigatory practices already comply with Intel. 381

B. Singapore GSS, May 28, 2018

The Singapore GSS was focused on excessive pricing and abuse of superior bargaining position. The seminar consisted of two panels and an enforcers’ roundtable. The panels consisted of a mix of private practitioners, in-house counsel, academics, and economists from Singapore, China, India, Korea, Japan, and Hong Kong.

The first panel on excessive pricing was moderated by Professor Hwang Lee and featured panelists Kirstie Nicholson, Naval Chopra, Fay Zhou, and Professor Burton Ong. 382 The panelists noted there was substantial divergence among competition agencies, including within the Asian region, not only with respect to whether to regulate excessive pricing, but also how to do so. For example, in India there is no clear test or definition of excessive pricing, but in China there are extensive guidelines setting forth various factors for consideration. In recent excessive pricing cases, of which there were several in the last year, the Competition Commission of India (CCI) has looked at costs and margin, but in some cases ultimately found such information to be inconclusive. To date, the CCI has not prescribed prices, while in China the competition

381. Margrethe Vestager, Speech at Studienvereinigung Kartellrecht International EU Competition Law Forum: A Market that Works for Consumers (Mar. 12, 2018) (“[The Intel] judgment has helped make the law clearer. But it doesn’t change much in practical terms. We already looked at the potential effects of rebates before we took action in the past—and we’ll keep on doing that, after this judgment.”).

382. Hwang Lee is a Professor at the Korea University School of Law. Kirstie Nicholson is Managing Counsel, Competition at BHP Billiton in Singapore. Fay Zhou is a partner at Linklaters LLP in China. Dr. Burton Ong is a Professor at the National University of Singapore. Naval Chopra is a partner with Shardul Amarchand Mangaldas & Co. in India.
agency and courts may do so. There are no specific excessive pricing provisions in Singapore’s competition law, and the Competition and Consumer Commission of Singapore (CCCS) has not brought any excessive pricing actions to date, but it was observed that there may be changes to enforcement policy with the recently expanded remit of the competition agency to cover consumer protection.

The panelists observed that while excessive pricing provisions in India and China have generally been modeled on European competition law, there are differences in how such provisions are enforced. While enforcement in Europe tends to be focused on consumer welfare, Asian competition agencies may base enforcement policy on industrial policy concerns. In India, some recent cases were instigated based on public protest or complaints.

The panelists observed that the divergence in enforcement approaches and policies makes it difficult for companies to comply.

The second panel on abuse of superior bargaining position was moderated by Joy Fuyuno and included Dominique Lombardi, Sean Sinsung Yun, Kimitoshi Yabuki, and Dr. Derek Ritzmann.383 The panelists explained that in Japan and Korea abuse of superior bargaining position is an unfair trade practice prosecuted under the antimonopoly laws. In both Japan and Korea, there may be an abuse of superior bargaining position where there is an unbalanced bargaining position, even if there is no dominance. There is no requirement of an actual effect on competition, although in Japan the abuse of superior bargaining position must have the tendency to impede competition and in Korea it is required that fair trade is likely to be harmed. In general, the inferior party must be commercially dependent on the superior party, and in Korea typically there should be a long-term commercial relationship between the parties. The panelists noted there is active enforcement of abuse of superior bargaining position in both Japan and Korea. In 2016, the Korea Fair Trade Commission (KFTC) brought 283 unfair trade practices cases, of which 50 percent involved abuse of superior bargaining position.

The panelists observed that while there is no such provision in the antitrust laws in the United States, it could be said that a similar concept is reflected in the doctrine of unconscionability.

383. Joy Fuyuno is Regional Senior Counsel, Asia at Microsoft in Singapore. Dominique Lombardi is a partner at Rajah & Tann LLP in Singapore. Sean Sinsung Yun is a partner at Yoon & Yang LLP in Korea. Kimitoshi Yabuki is managing partner of the Yabuki Law Firm in Japan. Dr. Derek Ritzmann is an economist in Hong Kong.
In France, there are two areas of law that are comparable. First, anticompetitive conduct includes abuse of economic dependency. To establish this violation, there must be economic dependence and an abuse. Earlier cases required the abuse to have an actual effect on competition, but in subsequent cases a likely effect has been deemed sufficient, since actual effects were often difficult to prove. Second, France’s Commercial Code prohibits agreements that restrict competition, including agreements that create a significant imbalance in the rights and obligations of the parties. An ongoing trading relationship, rather than a one-off transaction, is required. Cases brought under this law are not within the purview of the competition authority, but instead are heard by commercial courts. The panelists observed that in other jurisdictions claims of abuse of superior bargaining position are enforced by competition agencies in part because it is often difficult for a company to file a civil case against a company with a superior bargaining position, precisely because of its economic dependency on such a company.

Cases in this area thus far have not relied heavily on economic analysis. The panelists noted that economics provides a useful analytical framework, although the process of determining whether superior bargaining power exists is inherently imprecise. One possible approach is to limit findings of superior bargaining power only to those situations where the counterparty has no choice but to enter the deal. A fundamental problem observed by the panelists is that the concept of an abuse of superior bargaining position clashes to some degree with competition principles. That is, in some cases, it may mean that the competition authority is interfering with competition and protecting competitors. The panelists further remarked that it is difficult for a party to know or determine whether it is in a superior bargaining position, and that enforcement in this area may be problematic from an economic incentives perspective.

The seminar culminated with the enforcers’ roundtable, which featured Hiroshi Yamada, Deputy Secretary General for International Affairs of the Japan Fair Trade Commission; Moonsik Kim, Director of the Anti-Monopoly Division (Manufacturing) of the Korea Fair Trade Commission; and Herbert Fung, Director Business and Economics, of the Competition and Consumer Commission of Singapore. Ninette Dodoo moderated.384

It was observed that the purpose behind the abuse of superior bargaining position provisions was similar in Japan and Korea. In Japan,

384. Ninette Dodoo is a partner at Freshfields LLP in China.
one purpose was to protect small- and medium-sized enterprises. Similarly, in Korea the government was concerned about the power of chaebols (large, family-owned business conglomerates).

Korea’s excessive pricing laws were modeled after German competition law. The KFTC has issued only three decisions in which excessive pricing was found, while, between 1981 and 2016, it has brought more than 1600 abuse of superior bargaining position cases.

In contrast to Japan and Korea, Singapore does not have laws prohibiting abuse of superior bargaining position or excessive pricing. Historically, there were many debates about whether Singapore, a small and open economy that relies heavily on foreign investment, should have any competition laws at all. The U.S.-Singapore free trade agreement, however, made a competition regime necessary in order to strike a balance between fair trading and free trading. In Singapore, therefore, the focus is on cases that significantly impact competition. In this regard, dominance is a threshold screening factor. It was noted, however, that the proliferation of digital platforms has made dominance an increasingly difficult screening tool. While Singapore does not have a law prohibiting excessive pricing, the government may intervene where high prices cause foreclosure.

In addition to the panels and enforcers’ roundtable, the Singapore GSS included a live electronic poll, in which approximately half of the attendees participated. 77 percent of the Singapore GSS poll respondents agreed or strongly agreed that unilateral conduct should never be a competition law violation unless the actor has substantial market power or dominance. 73 percent disagreed or strongly disagreed with the statement that competition law enforcement “should be focused more on exploitative abuses than exclusionary conduct.” Respondents were split on whether fairness or industrial policy issues were a legitimate concern of competition agencies. 65 percent of respondents agreed or strongly agreed that they were concerned about companies’ ability to comply with unfair trade practices provisions such as abuse of superior bargaining position.

With respect to broader competition policy issues, 60 percent agreed or strongly agreed that in recent years competition law enforcement in Asia has been following a different path from that of the United States and Europe, and 69 percent of respondents agreed or strongly agreed that competition law enforcement in Asia should be uniquely defined and enforced due to cultural, historical, social, and economic factors. Only 34 percent of respondents agreed or strongly agreed that it is possible and desirable to harmonize competition law throughout Asia.
C. Brasilia, Brazil GSS, July 12, 2018

The Brasilia GSS conference took place at the Brasilia offices of the Superintendent, Conselho Administrativo De Defesa Economica (CADE). The conference consisted of two panels. The panel presentations were conducted on the record. Subsequent discussion by attendees was conducted on Chatham House rules.

The first panel addressed the topic: “Most-favored-nation (MFN) Clauses on Digital Platforms: Possible Harm to Competition.” The panel moderator was Alexander Cordeiro Macedo, CADE’s Superintendent, and included panel members Paula Farani de Azevedo, Eduardo Frade, Mariana Tavares de Araujo, and Paola Petroziello Pugliese. This panel focused particularly on the effects of MFN clauses when applied to Online Travel Agencies (OTAs) and other digital platforms under Brazilian law, assessed the effects and possible efficiencies of these contractual provisions, and drew analysis parameters from concrete cases.

Commissioner Azevedo led off with a general discussion of the historical use and treatment of MFNs in private contracts and their emergence more recently on internet digital platforms. Her presentation addressed both the perceived competitive dangers posed by MFNs, especially as a potential facilitator of coordination and a means for producing exclusionary effects and restricting innovation. She also examined the so-called “free rider” phenomenon which is often raised as a defense supporting the need for MFN provisions, and she discussed potential less restrictive alternatives to MFNs including fixed price arrangements that digital platforms might charge for featuring the product or service in response to threatened free-riding.

Eduardo Frade’s presentation focused on the use of MFNs by OTAs and used CADE’s recent administrative inquiry into this practice as his frame of reference. His remarks focused on the difference between “wide” parity clauses, which prevent the provider from offering lower prices on all platforms, versus “narrow” clauses whose restrictions affect only the provider’s use of its own website. Mr. Frade noted that CADE settled its OTA/MFN proceeding in 2018 based on an agreement that limited the OTAs to using only narrow MFN clauses, a resolution that was consistent with similar rulings in the European Union, France, Italy and Sweden, but

385. Paula Farani de Azevedo is a CADE Commissioner in Brasilia. Eduardo Frade is a member of the VMCA Advogados firm in Sao Paulo. Maraiana Tavares de Araujo is a member of the Levy & Salamao Advogados firm in Rio de Janeiro. Paola Petroziello Pugliese is a member of the Demarest Advogados firm in Sao Paulo.
which conflicted with a resolution in Germany that prohibited both narrow and wide clauses.

Mariana Tavares addressed the same OTA cases covered by Frade but also extended the discussion to a consideration of the use of MFN clauses in the motor vehicle insurance sector. Finally, Paola Pugliese provided a helpful discussion of the DOJ and EC proceedings in the *Apple eBooks* cases in 2013 and 2017, respectively, both of which led to prohibition of the particular MFN Apple was using in the publication sector.

The second panel on “The Role of Innovation” was moderated by Theodore Voorhees of Covington & Burling LLP in Washington, D.C., and included panelists Patricia Semensato Cabral, Amanda Flavio de Oliveira, Marcio C.S. Bueno, and Patricia Morita Sakowski. This second panel explored CADE’s approach to exclusionary effects analysis under Brazilian law in cases in which innovation, product design and intellectual property rights play a prominent role. The discussion addressed two broad questions: (1) whether there are any important differences between Brazil and other jurisdictions in the ways they assess competing claims that a dominant firm’s innovations, product improvements, and new products are procompetitive or anticompetitive; and (2) whether the degree of protection afforded to IPRs should depend on the IPR holder’s share of the relevant market, and, if so, how the analysis should be structured.

Patricia Cabral led off with a useful background discussion of the ways CADE analyzes innovation and “innovation markets” in its merger reviews with particular focus on CADE’s assessment of the Dow/DuPont merger of equals, which was approved subject to remedies in May 2017, and the Bayer/Monsanto merger which was also approved subject to agreed divestiture remedies. Ms. Cabral noted that in both cases the agency required divestment of research & development facilities to safeguard robust future innovation in the two affected industrial sectors.

Amanda Oliveira followed with a discussion of the Anfape case in which CADE investigated whether Brazil’s three major auto producers restricted aftermarket competition from non-OEM suppliers of spare auto parts through the OEMs’ abuse of their IPR. After the proceeding had been ongoing for ten years, CADE ultimately determined in March 2018 by a four to three vote that no IPR abuse had been found. Ms. Oliveira

386. Patricia Semensato Cabral is Head of the Merger and Antitrust Unit at CADE. Amanda Flavio de Oliveira is a professor at Universidade Federal de Minas Gerais in Belo Horizonte, Brazil. Marcio C.S. Bueno is a member of the Caminati Bueno Advogados firm in Sao Paulo. Patricia Morita Sakowski is Deputy Chief, Economic Department of CADE.
concluded with a discussion of emerging challenges that appear to be arising from disruptive innovation occurring in the fintech and cryptocurrency sectors. She offered a warning that it may be preferable for competition enforcement agencies to move cautiously by “monitor[ing] the development of the competitive dynamics” while preserving the possibility of ex post interventions, rather than “unrestrainedly replac[ing] business decisions with regulatory decisions.”

Marcio Bueno next addressed the question whether Brazil should pursue a “third way” between the U.S. and EU approaches to enforcing competition law in the use of IPR by dominant firms. Commenting on the key Brazilian cases in this area—Anfape (2018), Ericsson (2015), Ediouro (2015), Eli Lilly (2015) and Philips (2009)—Mr. Bueno found that the relevant enforcement experience is still somewhat limited and evolving, that CADE has been taking a conservative approach showing special concern to deter “sham litigation” approaches by judicial or administrative tribunals. In future years, Mr. Bueno expects CADE may be inclined to adopt a middle ground exercising caution but not hesitating to step in where needed to protect fledgling innovators from stronger incumbents, especially given the reality of relatively low levels of protection that are currently afforded to innovators under the current legal landscape in Brazil.

Finally, Patricia Sakowski focused on the Google Shopping case and provided the audience with a wide-ranging survey of exclusionary effects analyses used by various enforcement agencies in their efforts to distinguish anticompetitive exclusionary behavior from procompetitive innovation in the digital economy. Ms. Sakowski necessarily limited her remarks to general comments in consideration of the fact that the Google Shopping case was at the time still under ongoing CADE investigation. Four months later, the CADE superintendent announced in November 2018 his recommendation to close the investigation because the agency, after careful analysis, had been unable to find clear signs of competitive harm or any actual negative effects arising from Google innovation in the use of algorithms to order and prioritize the results Google’s search engine presented to shoppers.

At the conclusion of the two panels, the speakers and audience members divided into tables of eight-to-ten participants for a wide-ranging follow-up discussion of the topics featured in the panel presentations. The table comments were then summarized and organized by a rapporteur that had been assigned to each table and several write-ups were subsequently returned to the GSS co-chairs and then forwarded to the DDTF for incorporation into its final report. The participants in the table discussions
included many highly knowledgeable members of the Brazilian antitrust bar as well as numerous experienced CADE officials, however no formal effort was made to constitute the gathering as a scientific sample of the broader Brazilian competition community, nor even to generate a nominal consensus with regard to any of the core topics under discussion. Nevertheless, several themes seemed to emerge from the reported comments.

Regarding MFNs, audience members appeared to have shared concerns about the various ways misuse of this type of price-sensitive restraint might be used to harm competition, yet at the same time there seemed to be widespread acknowledgment that CADE’s deliberate, incremental, case-by-case approach to assessing MFNs, and the agency’s provisional drawing of a clear distinction between wide versus narrow MFNs based on actual, measured market effects, seems to be the correct way to proceed. A general rule of reason approach for MFN analysis thus seemed to garner widespread support. Similarly, with regard to the treatment of innovation factors, there seemed to be general agreement among many conference participants about the critical importance of safeguarding strong incentives to innovate as a key dynamic fostering competitiveness, with the implication that regulatory authorities should exercise prudence and caution before taking actions that could inadvertently impair the full effectuation of promising innovation-advancing conduct.