Competition Compliance 2019

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LEXOLOGY®
Getting The Deal Through

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Published by
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Tel: +44 20 3780 4147
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First published 2017
Third edition
ISBN 978-1-83862-121-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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King & Wood Mallesons

Lexology Getting The Deal Through is delighted to publish the third edition of *Competition Compliance*, which is available in print and online at www.lexology.com/gtdt.

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

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Chile.

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

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Susan Ning, Kate Peng and Zhifeng Chai of King & Wood Mallesons, for their continued assistance with this volume.

LEXOLOGY®
Getting The Deal Through

London
May 2019

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United Kingdom

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GENERAL

General attitudes

1 | What is the general attitude of business and the authorities to competition compliance?

Compliance with competition law is a priority for the UK Competition and Markets Authority (CMA), which seeks to educate and encourage compliance as well as deter infringements through enforcement action. The CMA deploys a wide range of tools to promote compliance, for example:

- advice on managing compliance risks through published guides, such as *Competition Law Risk – A Short Guide* (2017), *Competition Law Case Studies* (2015), *Competing fairly in business* (2015) and *How your business can achieve compliance with competition law* (2011);
- a series of short online films and an online quiz explaining the principles of competition law and giving advice on how to ensure compliance (2016 to 2019);
- open letters on compliance with competition law in particular sectors, such as in creative industries (2017), resale price maintenance in online markets (2016), medical practitioners (2015) and school uniform suppliers (2015);
- warning letters and advisory letters (see question 9);
- publishing summaries of cases that are closed without a formal prohibition or commitments decision (such as the closure of the investigation into rebates in the pharmaceutical sector in 2015 and a no grounds for action decision, also in the pharmaceutical sector, in 2019); and
- developing a free-to-use procurement Screening for Cartels tool to help identify bid rigging from tender data and publishing open letters to procurement professionals.

Business awareness of competition law continues to increase in the UK and it is common for larger companies to have compliance policies in place. Research commissioned by the CMA in 2018 nevertheless found that awareness of competition law remains low across the economy as a whole, particularly among smaller businesses. In its 2019/2020 Annual Plan, the CMA states that small and medium-sized enterprises 'have a lower level of awareness of competition and consumer law. It is therefore important that they understand and comply with the law, so that they treat their customers fairly and can report any illegality they witness to us.' The CMA's predecessor body, the Office of Fair Trading (the OFT), also published a detailed study of *Drivers of Compliance and Non-compliance with Competition Law* in 2010, analysing the factors that motivated companies to comply with competition law and the challenges they face.

Government compliance programmes

2 | Is there a government-approved standard for compliance programmes in your jurisdiction?

The CMA considers that an effective compliance culture requires a 'top down' commitment. Joint guidance from the CMA and Institute of Risk Management (*Competition Law Risk – A Short Guide*, 2017) states that 'senior management, especially the board, must demonstrate an unequivocal commitment to competition law compliance'.

The CMA has also published guidance on 'Company directors and competition law' (OFT1340), intended to assist directors in ensuring competition law compliance. It states that 'a director with responsibility for compliance with competition law will be expected to have sufficient grasp of the principles of competition law to identify and assess the types of risk to which the company is exposed', and 'it is reasonable to expect all directors to understand that compliance with competition law is important and that infringing competition law could lead to serious legal consequences for the company and for them as individuals.' It provides guidance on the risks of director disqualification, approaches to detecting and preventing infringements, and practical examples.

The CMA recommends that companies adopt a four-stage approach to competition law compliance, as follows (CMA and Institute for Risk Management, *Competition Law Risk – A Short Guide*, 2017):

- identify the key competition law risks faced by the business;
- analyse and evaluate how serious the risks are, for example, categorising them as low, medium or high, and identifying employees in high-risk areas (eg, staff that have contact with competitors);
- manage the risks through policies, procedures and measures to detect and address breaches if they occur, depending on how serious the risk is; and
- monitor and review regularly competition law compliance, such as through annual reviews or after acquiring a new business or following a competition law investigation.

Applicability of compliance programmes

3 | Is the compliance guidance generally applicable or do best practice and obligations depend on company size and the sector of the economy it operates in?

Competition law applies to all businesses, and the CMA has taken enforcement action against companies with small turnovers. The risk of enforcement for breaches of competition law therefore applies to both large and small firms, including in abuse of dominance cases. The risk-based approach to competition law compliance promoted by the CMA also applies to firms of all sizes; firms are encouraged to assess their individual exposure and take proportionate steps to address the risks they face.

In addition to the materials above, the CMA has published guidance for small businesses (OFT1330), as well as a checklist for small

and medium-sized enterprises (SME compliance checklist, 2015). The CMA works closely with the Federation of Small Businesses and other industry bodies to improve awareness of competition law across all industry sectors.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The mere existence of a compliance programme is not sufficient to trigger a discount. The CMA's fining guidelines (CMA73) explain that the CMA may treat evidence of 'adequate steps' to improve compliance as a mitigating factor that can result in a fine reduction of up to 10 per cent.

The CMA has reduced fines on the basis of compliance measures in a series of recent cases, including the following.

- Residential real estate agency services (2017). The CMA applied discounts of 10 per cent to certain real estate agencies that had implemented compliance programmes and a discount of 5 per cent for another agency that had taken steps to mitigate the risks of non-compliance (but without taking steps to improve the identification, assessment of its exposure and review of its compliance measures).
- Bathroom fittings (2016). The CMA applied a discount of 5 per cent after the company's board publicly adopted a competition law compliance programme and supplied evidence to the CMA that senior managers would receive competition law training. The company also agreed to supply an annual compliance report to the CMA for the next three years.
- Eye surgeons (2015). The CMA applied a discount of 10 per cent after the introduction of an organisation-wide compliance programme and a clear commitment to compliance by the association of private ophthalmologists that would set an example to members of the profession.
- Estate and lettings agents (2015). The CMA applied a discount of 5 per cent after receiving evidence that senior managers had been trained in competition law compliance and that a competition manual had been implemented.

In exceptional circumstances, the CMA may treat the existence of a compliance programme as an aggravating factor where it is used to conceal or facilitate an infringement or to mislead the CMA.

IMPLEMENTING A COMPETITION COMPLIANCE PROGRAMME

Commitment to competition compliance

5 How does a company demonstrate its commitment to competition compliance?

Evidence of a top-down commitment to competition law compliance can take various forms, such as a board resolution affirming its commitment to competition law compliance, adopting a compliance code or handbook for employees, and messages from senior management to staff affirming the company's compliance culture. To demonstrate a commitment to compliance, statements 'from the top' have to be backed up with measures to identify, assess and manage risks, and to review compliance procedures. The CMA has published guidance on 'Company directors and competition law' to provide directors with practical advice on their competition law obligations.

Risk identification

6 What are the key features of a compliance programme regarding risk identification?

The CMA's guidance identifies a series of risks that can be grouped in the following categories:

- risks from contact with competitors (eg, contact between the employees of a company and rivals (eg, at a trade association); frequent movement of personnel between competing firms; and employee knowledge of competitors' business plans or prices);
- risks from contractual, structural or other links with competitors (eg, sharing the same suppliers as competitors; having customers who are also competitors; and having partnerships or joint selling or purchasing arrangements with competitors);
- risks from specific types of agreements or conduct (eg, entering into exclusive contracts for long periods; agreements that require confidential information to be shared with competitors; and imposing resale price restrictions on retailers that sell a company's product); and
- risks that a company may be treated as subject to 'abuse of dominance' rules (eg, having a large share of any markets in which the company operates).

Risk-assessment

7 What are the key features of a compliance programme regarding risk-assessment?

Risks can be categorised according to their seriousness, considering both the likelihood of the risk materialising and the consequences of a breach.

The likelihood of the risk materialising depends on the circumstances at issue. For example, the likelihood of an inappropriate exchange of confidential information may depend on the frequency of contact with competitors, and the number (and role) of employees that have contact with competitors.

Potential consequences of a breach may include a fine, private damages actions, loss of reputation, and sanctions on individuals (eg, criminal sanctions or director disqualification).

Taking these factors into account, the CMA's guidance states that the level of risk can be expressed in quantitative terms (eg, assigning the risk a monetary value) or qualitative terms (eg, low, medium or high), and that compliance efforts should be targeted particularly at business activities giving rise to higher levels of risk.

Risk-mitigation

8 What are the key features of a compliance programme regarding risk-mitigation?

Appropriate steps to manage competition law depend on the specific risks identified – and their seriousness – possibly including:

- competition law training for management and employees;
- codes of conduct, checklists, or competition law manuals;
- carrying out due diligence on the objectives and operation of industry associations before joining them;
- logging records of conversations with competitors;
- attendance of competition counsel and presentation of reminders at trade association meetings;
- making advice available to employees before entering into new contracts;
- establishing a system for employees to report confidentially any concerns they have;
- making anticompetitive conduct a disciplinary issue; and

- implementing information firewalls as regards joint ventures with competitors.

Compliance programme review

9 What are the key features of a compliance programme regarding review?

Monitoring and reviewing can involve key performance indicators (eg, percentages of staff trained) and carrying out internal audits. Reviews may also be prompted by the CMA sending advisory or warning letters to companies. These letters explain any concerns that the CMA may have about the company's compliance with competition law. Advisory letters recommend that the business carry out a self-assessment of its compliance with competition law and warning letters request further information about what the company has done or will do to ensure that it complies with competition law. The CMA may decide to launch a formal investigation at a later date, and may impose a higher financial penalty if the company fails to act on the requests in the warning or advisory letter. For example, the CMA increased the fine it imposed on National Lighting Company for engaging in resale price maintenance by 25 per cent in 2017 because it had failed to act upon an earlier warning letter. The CMA issued 35 warning letters and 22 advisory letters in 2018. The Financial Conduct Authority (FCA), which has concurrent competition law powers in relation to financial services, also issues advisory and 'on notice' letters.

DEALINGS WITH COMPETITORS

Arrangements to avoid

10 What types of arrangements should the company avoid entering into with its competitors?

The Competition Act 1998 prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, unless they are exempt – either under a block exemption or individual exemption (see question 13) (the Chapter 1 Prohibition). Article 101 of the Treaty of the Functioning of European Union (TFEU) also applies directly in the UK. Its provisions are substantially identical to the Chapter 1 Prohibition, but apply only to agreements that may affect trade between EU member states.

The Chapter 1 Prohibition and article 101 specifically refer to agreements relating to price-fixing, limiting production, market-sharing, price discrimination and imposing unrelated supplementary obligations in agreements with third parties that place them at a competitive disadvantage. The scope of the prohibition is broad, however, and has also been applied to vertical agreements (eg, resale price maintenance), information exchanges and 'reverse payment settlements' in patent litigation. It also extends to certain categories of horizontal cooperation agreements and joint ventures. The UK competition authorities (the CMA, as well as nine sectoral regulators that can apply UK and EU competition law in their regulated sectors) defer to the European Commission's Guidelines on Horizontal Cooperation Agreements (2011/C 11/01).

Suggested precautions

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

This risk typically arises when a company enters into joint ventures or joint purchasing or selling arrangements with competitors, or where they participate in data-sharing arrangements (even via third parties).

Measures to mitigate risks can include information firewalls, quarantining employees that have had access to rivals' confidential information, and ensuring sufficient aggregation of data to avoid having access to rivals' commercially sensitive information.

Where a company intends to rely on a block exemption or individual exemption, it is prudent to record formally the basis on which the company considers the agreement to be exempt.

Trade association meetings can also give rise to competition-law compliance risks. Companies participating in trade association activities can mitigate these risks by checking the proposed agenda in advance, asking competition counsel to attend, ensuring that discussions do not stray onto prohibited topics (and leaving the meeting if they do) and keeping detailed minutes.

Individuals can also reduce their exposure to the risk of prosecution under the criminal cartel offence by notifying customers of the agreement in advance or publishing information about the agreement in any of the *London Gazette*, the *Edinburgh Gazette* or the *Belfast Gazette*.

CARTELS

Cartel behaviour

12 What form must behaviour take to constitute a cartel?

The Chapter 1 Prohibition applies to a broader set of agreements than 'cartel activity' as defined for the purposes of leniency (see question 15) or the criminal 'cartel offence' under the Enterprise Act 2002. A wide range of behaviour can fall within the scope of the Chapter 1 prohibition.

'Agreements' include oral and written agreements, whether formal or informal, and whether legally binding or not. Following the Court of Justice, it is sufficient that the parties 'have expressed their joint intention to conduct themselves on the market in a specific way' (*Hercules Chemicals*, 1991) or that there is a 'concurrence of wills' that 'constitutes the faithful expression of the parties' intention' (*Dresdner Bank*, 2006).

The Chapter 1 Prohibition also applies to 'concerted practices'. The CMA adopts the approach of the Court of Justice in *T-Mobile Netherlands* that a single meeting between competitors may, in principle, constitute a sufficient basis to find a concerted practice. In the context of information exchange, a concerted practice can be deemed to arise from even unilateral (one-way) disclosure of information unless the recipient manifestly opposes receiving it (*RBS/Barclays*, 2011).

In a case concerning online sales of poster frames, the CMA confirmed that using automated repricing software to give effect to an agreement between sellers not to undercut each other fell within the scope of the Chapter 1 Prohibition (August 2016).

Avoiding sanctions

13 Under what circumstances can cartels be exempted from sanctions?

Outside the scope of the block exemptions (which automatically exempt certain categories of agreement that are generally deemed procompetitive), agreements may be individually exempt from article 101 and the Chapter 1 Prohibition if they contribute to improving production or distribution or promoting technical or economic progress, provided they allow consumers a fair share of the resulting benefit, the restrictions are indispensable for achieving these objectives, and they do not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Although it is possible, in principle, for a cartel agreement to satisfy these criteria, it is very rare in practice. For example, the European Commission notes the possibility for 'crisis cartels' to be exempt from article 101 TFEU, although the parties would need to show 'that the industry concerned indeed suffers from a structural overcapacity problem, namely, market forces alone cannot remove that excess

overcapacity' as well as demonstrating the benefit to consumers (2011 submission to the OECD Global Forum for Competition).

Firms must assess for themselves whether their agreements are exempt from the Chapter 1 Prohibition and article 101. There is no mechanism to apply for exemption. The CMA may offer 'short form' opinions on whether specific proposed agreements are individually exempt (eg, *P&H/Makro* – joint purchasing agreement (2010) and *NFU/CLA* – rate recommendations (2012)).

Separately, the UK competition authorities cannot impose fines for breaches of the Chapter 1 Prohibition where the aggregate turnover of the parties to the agreement does not exceed £20 million, unless the agreement involves price fixing or the CMA has withdrawn the benefit of this statutory exclusion in advance ('small agreements'). Even in these cases, the competition authorities can issue an infringement decision and the companies involved can be subject to damages actions before the courts.

Exchanging information

14 | Can the company exchange information with its competitors?

Companies risk infringing competition law if they exchange strategic information, either directly or via third parties. Strategic information generally includes information that reduces uncertainty between the companies (eg, current or future prices, cost structures, output levels, marketing plans, customer lists, investments and business risks), and information is more likely to be viewed as strategic if it is recent, non-aggregated, non-public, and exchanged frequently (European Commission, Horizontal Cooperation Guidelines). Sharing information about future pricing intentions or future strategy is generally considered an infringement of article 101 and Chapter 1 'by object' (without any need to show anticompetitive effects).

In 2011, a CMA investigation into the exchange of insurance quotations between motor insurance suppliers was resolved through commitments only to exchange such information if it was anonymised, aggregated across at least five insurers, and was at least six months old. The CMA's recent infringement decision in *Galvanised Steel Tanks* (2016) – which was upheld on appeal – concerned the alleged exchange of current and future pricing intentions at a single meeting. The OFT's decision against Barclays and RBS in 2011 concerned the disclosure of sensitive price information by RBS to Barclays.

LENIENCY

Cartel leniency programmes

15 | Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Leniency is available for firms that confess to participating in 'cartel activity', comprising price fixing (including resale price maintenance), bid rigging, output restrictions and market sharing (OFT1495).

To qualify for leniency, a firm has to confess the infringement, refrain from further participating in the cartel and provide all relevant, non-privileged information, documents and evidence available to it. It must also cooperate throughout the investigation until conclusion (including criminal proceedings and defending civil or criminal appeals).

Three types of 'immunity' are available under the CMA's leniency regime:

Type A immunity

The first applicant for leniency obtains full corporate immunity from financial penalties and blanket immunity for individual employees and officers of the company from criminal prosecution and director disqualification. The applicant must provide information that gives the CMA a sufficient basis for taking forward a credible investigation. Type A immunity is available only if there is no pre-existing investigation into the cartel activity.

Type B leniency

Where there is a pre-existing CMA investigation, the first applicant may still obtain a discretionary discount on any financial penalty of up to 100 per cent, discretionary immunity from criminal prosecution for some or all employees and officers of the company, and automatic immunity from director disqualification orders. The applicant must supply information that adds significant value to the CMA's investigation.

Type C leniency

Second or subsequent applicants who apply for leniency prior to the statement of objections can obtain a discretionary discount on any financial penalty of up to 50 per cent, discretionary immunity from criminal prosecution for specific employees and officers of the company, and automatic immunity from director disqualification orders. The applicant must supply information that adds significant value to the CMA's investigation.

Applicants for types A and B leniency must not have taken steps to coerce another firm to have participated in the cartel activity.

The fact that an undertaking has applied for leniency will not normally be revealed to other undertakings until a statement of objections has been issued, although the identity of the applicant may sometimes be inferred when information it has supplied is put by the CMA to third-party witnesses.

16 | Can the company apply for leniency for itself and its individual officers and employees?

Yes (see question 15). Individuals can also apply for criminal immunity themselves.

17 | Can the company reserve a place in line before a formal leniency application is ready?

The CMA encourages businesses considering a leniency application to contact it on a no-names basis (usually through its external legal adviser) in the first instance before applying for a marker. If type A immunity is available, the applicant is expected to reveal its identity and proceed with the application. If type A immunity is unavailable but type B or C is potentially available, the party is not required to disclose its identity unless it decides to proceed with an application.

Obtaining a marker enables a company to hold its place in the queue for leniency while it goes about providing evidence required by the CMA to perfect the application. To obtain a marker, the applicant needs to 'establish a concrete basis for a suspicion of cartel activity' and a 'demonstration of a genuine intention to confess' (OFT1495).

Whistle-blowing

18 | If the company blows the whistle on other cartels, can it get any benefit?

Leniency applicants are not obliged to supply materials that are outside the scope of the leniency application. Where a leniency applicant discovers that it has also taken part in another distinct cartel, the CMA's guidance encourages it to apply for leniency – and disclose relevant information and evidence – separately in respect of that second cartel.

As an incentive, where companies successfully apply for type A immunity or type B leniency in respect of the second cartel, the CMA will also grant a further discount in the fine that it imposes in respect of the first cartel, called 'leniency plus', in addition to granting immunity

or leniency in relation to the second cartel. The CMA has stated that the additional 'leniency plus' discount available will likely be small (OFT1495).

The CMA offers a financial reward of up to £100,000 (and anonymity) to individual whistle-blowers who were not involved in the cartel in question. It also receives 'tip-offs' via a cartels hotline, which, for example, led the CMA to discover a bid-rigging arrangement in respect of household coal supplies in 2018.

DEALING WITH COMMERCIAL PARTNERS (SUPPLIERS AND CUSTOMERS)

Vertical agreements

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Vertical agreements are considered less likely to produce anti-competitive effects than horizontal agreements. The CMA's guidance notes that 'vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements' (OFT419, paragraph 1.4).

The European Vertical Agreements Block Exemption Regulation applies directly in the UK. Agreements that fulfil the criteria for block exemption but do not affect trade between EU member states also benefit from the block exemption by virtue of 'parallel exemption' under the Competition Act 1998. The same principles apply to the EU Block Exemption Regulations relating to specialisation agreements, research and development, technology transfer and motor vehicles. There is also a UK Block Exemption Order (guaranteeing exemption from the Chapter 1 Prohibition) that covers certain categories of public transport ticketing schemes.

The Vertical Agreements Block Exemption applies where both the supplier and purchaser have market shares below 30 per cent and the agreement does not contain a 'hardcore restraint' or an excluded restriction (eg, certain non-compete provisions).

Hardcore restraints are restrictions of article 101 or Chapter 1 'by object'. They do not benefit from block exemption and are presumed not to satisfy the criteria for exemption on an individual basis. These include vertical price-fixing (resale price maintenance), restrictions on sales to end users in a selective distribution system, and restrictions on the territories or customer groups to which purchasers can resell a product.

Recently, the CMA has focused on resale price maintenance as a 'hardcore' and 'by object' restriction of competition in several cases. In 2016, for example, the CMA imposed fines in the *Bathroom Fittings* and *Fridge Supplies* cases, where companies imposed resale price maintenance with respect to online sales. In 2019, it issued a statement of objections to Casio, alleging that it had engaged in resale price maintenance in the musical instrument sector relying on price-monitoring software.

Other types of vertical agreements that fall outside the block exemption (eg, non-compete agreements, or single branding arrangements where the supplier or purchaser has a share above 30 per cent) are assessed by reference to their actual effects on competition. If a party to the agreement is dominant, it may also be assessed under the Chapter 2 Prohibition or article 102 TFEU.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

In principle, no agreements are per se illegal. Even 'by object' restraints (eg, resale price maintenance) – where a competition authority or claimant does not have to prove the anticompetitive effects of the agreement – can be individually exempt where the conditions outlined in question 13 are met. The burden of proving that an agreement is exempt falls on the party under investigation, however, and demonstrating that the restraint is indispensable to the pro-competitive objective is a high threshold to meet in cases involving 'by object' restrictions.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

See questions 13 and 19.

HOW TO BEHAVE AS A MARKET DOMINANT PLAYER

Determining dominant market position

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

'Dominance' is defined as the power of an undertaking to behave to an appreciable extent independently of competitors, customers, and ultimately consumers. The assessment of dominance under UK law (the Chapter 2 Prohibition) is consistent with EU law (article 102 TFEU), which also applies directly in the UK.

As a first step, the CMA (or other UK competition authority) defines the relevant product and geographic market. It then considers whether the undertaking has substantial market power on that market, taking into account 'market shares, entry conditions, and the degree of buyer power from the undertaking's customers'. If the undertaking 'does not face sufficiently strong competitive pressure' in the relevant market, it may be treated as dominant. In other words, according to CMA guidance, 'market power can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels' (OFT415). At its narrowest, the CMA has identified a market comprising just one product: for example, it identified a market for the 'manufacture of Pfizer-manufactured phenytoin sodium capsules' in its 2016 decision that Pfizer and Flynn had imposed excessive prices in breach of the Chapter 2 Prohibition.

Within the relevant market, the CMA applies a (rebuttable) presumption that an undertaking is dominant if it 'has a market share persistently above 50 per cent'. High market shares are not determinative, though. The UK Competition Appeal Tribunal (the CAT) declined to presume dominance where the defendant had a market share of 89 per cent, following the loss of the defendant's statutory monopoly (National Grid).

CMA guidance also states that it is unlikely that an undertaking could be dominant if it has a market share below 40 per cent (OFT402). Ofcom's abuse of dominance investigation into BT in 2008 (NCNN 500) in exceptional circumstances found that BT was dominant with a market share of below 31 per cent.

There is no minimum market size threshold: a 'dominant position' refers to a dominant position in the United Kingdom or any part of the UK. This means that dominant positions can be found even for small suppliers active in small product or geographic markets. For example, in Cardiff Bus (2008), the OFT found that Cardiff Bus (which had a turnover of less than £50 million) had abused its dominant position on the markets for certain types of bus service in Cardiff. In 2004, the CAT found dominance in relation to the supply of crematorium services

to local funeral directors operating in a small number of towns in the county of Hertfordshire.

Abuse of dominance

23 | If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

The Competition Act 1998 lists examples of potentially abusive conduct, including:

- unfair prices or trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance of supplementary obligations that have no connection with the subject of the contracts.

This list is not exhaustive. Any conduct by a dominant under-taking that excludes competitors or exploits customers is potentially abusive, unless that conduct is objectively justified. Other well-established forms of abuse include a refusal to supply an essential facility, margin squeeze, exclusive dealing, loyalty-inducing rebates and predatory pricing.

UK cases in recent years have dealt with novel forms of abuse (often following developments in EU competition law), including the tactical withdrawal from the market of a pharmaceutical products once the patent expired (*Gaviscon*, 2010), and so-called 'reverse payment' settlements of patent litigation with generic drug suppliers (*GlaxoSmithKline*, 2016).

24 | Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

There is no equivalent of the leniency regime or block exemptions for abuses of dominance. Conduct that is objectively justified will not, however, be considered abusive (see, for example, the High Court's 2016 judgment in *Streetmap v Google*).

As for small agreements (see question 13), the CMA cannot impose a financial penalty in relation to 'conduct of minor significance', defined as conduct by a company whose turnover in the year preceding the infringement was £50 million or less. This was applied in *Cardiff Bus* (2008), where the company was found to have abused its dominant position through predatory pricing but no fine was imposed.

In addition, exemptions from the Chapter 2 Prohibition exist for undertakings that have been entrusted with carrying out 'services of general economic interest' (to the extent that the Chapter 2 Prohibition would prevent them from carrying out those services), conduct that is carried out to comply with a legal requirement and conduct that the Secretary of State specifies as being excluded from the Chapter 2 Prohibition to avoid a conflict with the UK's international obligations or for reasons of public policy.

COMPETITION COMPLIANCE IN MERGERS AND ACQUISITIONS

Competition authority approval

25 | Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

The CMA has jurisdiction to investigate 'relevant merger situations' – where two or more enterprises cease to be distinct, including the acquisition of control or the ability to exercise a material influence over another business, mergers, and certain joint ventures – if the acquired enterprise has a UK turnover in excess of £70 million (the 'turnover test') or if it creates or increases a share of supply or purchases of particular goods or services of at least 25 per cent in the UK or a substantial part of it (the 'share of supply' test). It covers both anticipated and completed transactions. Lower thresholds apply to mergers where the target develops or produces items for military or 'dual' use, computer hardware or quantum technology.

There is no obligation to obtain approval for mergers before completion, but the CMA can undertake ex officio investigations into mergers that have not been notified voluntarily. Where the CMA has reasonable grounds for suspecting that there is a relevant merger situation, it can order the purchaser to refrain from – or reverse – any 'pre-emptive' actions that could prejudice a reference of the merger for a Phase II investigation or any remedial actions that the CMA may require following its investigation.

In the case of completed mergers, the CMA is generally precluded from referring the merger for a Phase II investigation after four months from completion (or from the date on which completion is publicly announced, if later).

26 | How long does it normally take to obtain approval?

The CMA has 40 working days to undertake its Phase I investigation, subject to possible extensions if the merger parties offer 'undertakings in lieu' to avoid a Phase II reference. This period begins on the date of formal notification or (in the case of ex officio investigations) when the CMA has sufficient information to begin its investigation. Before Phase I, parties are expected to engage in pre-notification discussions and evidence gathering, which may take at least two weeks in non-problematic mergers and can take several months in more complex cases. Once the statutory timetable has begun, the CMA has the power to 'stop the clock' if the parties do not respond to a formal information request by the stated deadline.

If a merger is referred to a Phase II investigation, an Inquiry Group of independent CMA members has 24 weeks to investigate and publish its report, subject to an extension of up to eight weeks in special circumstances. If the CMA finds that the merger has resulted in (or may be expected to result in) a 'substantial lessening of competition' it has 12 weeks to take a decision that remedies, mitigates, or prevents the substantial lessening of competition or the adverse effects that may result from it (subject to an extension by a further six weeks).

In 2018, the CMA stated its objective to clear at least 70 per cent of Phase I mergers within 35 working days, and to complete 70 per cent of Phase II merger investigations without extending the statutory deadline.

27 | If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The CMA's duty is to consider whether a relevant merger situation has occurred and whether it has resulted or may be expected to result in

a substantial lessening of competition. Mergers are exempt from the Chapter 1 Prohibition and this exemption extends to agreements that are ancillary (directly related and necessary) to the merger. In considering whether an agreement is ancillary, the CMA applies the European Commission's Notice on restrictions directly related and necessary to concentrations (2005/C 56/03).

A decision that the merger situation is not expected to create an anticompetitive outcome cannot be read, however, as approval of all the terms of agreements between the parties. The CMA's guidance explains that, given the constraints of the Phase I review process, the CMA will not normally express a view in its merger decisions of whether a particular restraint as between the parties is 'ancillary' to the merger or 'restrictive'. Parties must carry out their own assessments. The CMA may exceptionally agree to provide guidance if the 'restraint' raises novel or unresolved questions (CMA2).

Failure to file

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

As noted above, there is no obligation to notify the CMA of a merger. The CMA may, within certain time limits, investigate and impose remedies on mergers that have been completed.

If the CMA has opened an investigation, failing to provide information that the CMA requests may result in a delay to the CMA opening the Phase I investigation or suspensions of the statutory timetables. In *Arriva Passenger Services/Centrebus* (2014) the timetable was suspended for almost three months, and in *Ballyclare/LHD* (2014) it was suspended for approximately four months following a failure to provide information requested by the OFT.

The CMA can also impose fines on parties that, without reasonable excuse, do not respond to a formal information request within the stated deadline. For example, the CMA fined Hungryhouse £20,000 in 2017 for failing to produce certain information within the allowed deadline.

INVESTIGATION AND SETTLEMENT

Legal representation

29 Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

The company and its officers or employees typically require separate legal representation where there is a risk of a conflict of interest. For example, this could arise in cartel investigations that might also involve lead to criminal prosecutions of individuals, separate from the civil investigation of the company. Particular considerations arise where the company is applying for type B or C leniency and is, therefore, obliged to cooperate with the CMA's investigation but individual employees or officers may not have been granted immunity from criminal prosecution (see question 15).

CMA guidance refers to the need to consider conflicts of interest where the CMA exercises its powers to summon individuals who have a connection with the company to a compulsory interview. The CMA considers it inappropriate that the interviewee should be accompanied by a legal adviser who is acting only for the company, and reminds advisers acting for both the company and the interviewee to consider any risk of a conflict of interest arising.

Dawn raids

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The CMA can conduct dawn raids as part of an investigation into suspected anticompetitive agreements, abusive conduct, the criminal cartel offence and possible applications for director disqualification orders. It may also carry out inspections on behalf of the European Commission or other EU national competition authorities. Inspections fall into the following three categories:

Inspections of business premises without a warrant

The CMA's officers are entitled to:

- require anyone on the premises to produce documents that the officers consider relevant to the investigation;
- provide an explanation of such documents;
- state where such documents may be found;
- take copies of documents;
- require electronic information that they consider relevant to be produced in a legible form that can be taken away; and
- take steps that appear necessary to preserve documents that they consider relevant to the investigation.

Inspections of business premises with a warrant

In addition to the above powers, a warrant allows officers to use such force as is reasonably necessary to enter the premises (including unoccupied premises). Officers also obtain the right to carry out searches, not merely to require documents to be produced to them.

Inspections of domestic premises

The High Court or CAT may issue a warrant to search domestic premises that are used in connection with a company's affairs.

Inspections of business or domestic premises relating to the criminal cartel offence always require a warrant.

In 2017, the CMA faced its first challenge to a warrant granted under section 28 of the Competition Act. The case concerned a warrant to search Concordia's premises in respect of documents relating to two pharmaceutical drugs that were already the subject of an ongoing investigation. Concordia applied to vary or discharge the warrant, arguing that there was no risk of such documents being concealed or destroyed. The warrant was originally granted ex parte and defended partly on the basis of evidence that was subject to public interest immunity (and that therefore would not be disclosed to Concordia). In January 2019, the High Court dismissed Concordia's application, finding that the CMA had reasonable grounds to suspect that the documents in question might otherwise have been concealed or destroyed.

31 What are the company's rights and obligations during a dawn raid?

It is a criminal offence to obstruct the CMA's unannounced inspections, which, in the case of inspections carried out under a warrant, can result in imprisonment. It is also a criminal offence to destroy, falsify or conceal documents that the CMA has required to be produced, or to provide false or misleading information to CMA officials.

The company has the following rights in relation to 'dawn raids':

- Right of information. A right to be provided with evidence of the CMA authorisation, a document setting out the subject matter and purpose of the inspection, and the warrant (as applicable).
- Right to legal privilege. The CMA is not entitled to take copies of privileged documents. To establish that the document is privileged, CMA inspectors may want to see at least the letterhead (or sender

email address), as well as the subject line. In cases of disagreement, the inspectors may agree to 'seal' the documents to resolve the question of privilege at a later stage.

- Right of privilege against self-incrimination. The CMA's right to require factual explanations of documents cannot compel a company to provide answers that would involve the admission of an infringement of competition law.
- Right to legal advice. The occupier of the premises is entitled to have their legal adviser present. The CMA will typically wait a 'reasonable time' for legal advice to be sought (although it does not have to), possibly subject to requiring filing cabinets to be sealed, refraining from moving business records, and suspending external email (CMA8).

Settlement mechanisms

32 | Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

The CMA can accept commitments from, or enter into a settlement agreement with, companies under investigation.

Commitments procedure

The CMA can accept binding commitments from the company in cases where 'the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time' (CMA 8, paragraph 10.16). CMA guidance also explains that commitments are very unlikely to be accepted in cases concerning 'secret cartels' or a 'serious' abuse of dominance.

If the CMA accepts commitments, there is no finding – or admission – of an infringement. Commitments can, in principle, be accepted at any stage of the investigation (although the CMA is unlikely to accept commitments after it has issued a Statement of Objections). The CMA will give third parties an opportunity to comment on the commitments (CMA8), and decisions to accept commitments are subject to judicial review (for example, *Skyscanner v CMA* (2014)). Recent cases resolved through commitments include the CMA's investigations in *Epyx* (2014) and *Road fuels* (2014), as well as the Office of Rail and Road's *Freightliner* (2015) investigation.

Settlements procedure

Settlement generally arises at a later stage of the investigation once the CMA is satisfied that it has met the evidential standard for issuing an infringement decision. Under the settlement procedure, the company admits that it has infringed competition law and agrees to pay a financial penalty of a maximum amount that takes into account a discount of up to 20 per cent for cases settled before a statement of objections is issued, or 10 per cent afterwards.

The company also accepts a streamlined administrative process, involving reduced access to file (eg, limited to key documents only), no written representations in response to the statement of objections (except in relation to 'manifest factual inaccuracies'), and no oral hearing. The settling company agrees to be bound by the ultimate infringement decision, even if other addressees of the decision successfully appeal against it.

The settlement procedure has to respect the principle of equal treatment. In the OFT's *Tobacco* decision (2010), the OFT gave assurances to one – but not all – settling companies that it would repay the fine in the event of a successful appeal by non-settling defendants. The settling parties that did not benefit from the same assurances argued that the OFT had breached the principle of equal treatment and therefore ought to repay the fines that they had paid. The OFT refused to do so and its decision was appealed to the courts. The Supreme Court ultimately held that, while the principle of equal treatment did apply, the OFT was not obliged to repay fines that had been lawfully imposed and paid at the time.

33 | What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The CMA may be willing to grant a discount on the financial penalty of 5 to 10 per cent (see question 4). This discount is also available to companies that participate in the settlement procedure (see question 32). For example, in *Gaviscon* (2010), Reckitt Benckiser received a discount of 5 per cent on the basis that it had 'demonstrated that it has taken adequate steps to ensure compliance, in particular, by investing significant resources into developing a comprehensive and effective competition law compliance policy'.

Corporate monitorships

34 | Are corporate monitorships used in your jurisdiction?

'Monitoring trustees' are typically used to ensure that merger parties comply with 'hold separate' orders (see question 25). Under the CMA's merger guidance, it will normally consider the need for a monitoring trustee at Phase I of the investigation where, among other factors, there is substantial integration of the businesses already. At Phase II, the CMA will usually require a monitoring trustee to be appointed in completed mergers unless the parties provide compelling evidence that there is little risk of pre-emptive action (CMA2). The CMA has also required monitoring trustees to be appointed to oversee the implementation of remedies in mergers and market investigations.

The role of the monitoring trustee is generally to oversee compliance and the parties have a duty to cooperate. Any breach of an initial enforcement order (including provisions requiring cooperation with a monitoring trustee) can expose the parties to fines of up to 5 per cent of worldwide turnover.

Monitoring trustees may also be used to oversee compliance with remedies or commitments in antitrust (anticompetitive agreements and dominance) cases, although this is relatively rare in practice.

Statements of facts

35 | Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class-actions or representative claims?

Under the settlement procedure, the CMA issues an infringement decision that the settling company agrees not to challenge except for manifest factual inaccuracies. This infringement decision is binding on the High Court or CAT for the purposes of private damages actions, just as any contested infringement decision would be, as are any 'findings of fact' in the decision (sections 58 and 58A of the Competition Act 1998).

Under the EU Damages Directive (implemented in the UK by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017), the UK courts and CAT cannot order the disclosure of a defendant's settlement submission in a private damages action.

A commitments decision expresses only the CMA's preliminary conclusions and does not give rise to a finding of infringement that enables private 'follow-on' actions, although claimants are free to cite it as part of a standalone action.

Invoking legal privilege

36 | Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Companies facing antitrust or merger investigations cannot be required to disclose privileged documents or information in response to requests for information and CMA officials are not allowed to copy privileged information when carrying out inspections of business or domestic premises (see questions 30 and 31). Individuals cannot be compelled to disclose privileged information when summoned to compulsory CMA interviews. The following types of privilege most frequently raise questions.

Legal advice privilege applies to confidential communications between a client and legal adviser for the purposes of giving or obtaining legal advice. Unlike EU rules on privilege, legal advisers include in-house counsel. English law has, however, developed a narrow definition of the 'client', which may only include a small group of people who are tasked with obtaining legal advice (following the *Three Rivers* case). Thus, the recent *RBS Rights Issue* litigation made clear that lawyers' records of discussions with company employees (who did not form part of the client) would not be protected by legal advice privilege. To address this risk, a company's board may wish to designate particular employees with authority to seek legal advice on behalf of the organisation.

Litigation privilege applies to communications between a legal adviser and client or a third party that were for the dominant purpose of litigation that is reasonably in prospect. In an appeal against the OFT's *Dairy products* (2011) decision, the CAT held that communications between Tesco's lawyers and potential third-party witnesses were covered by litigation privilege since, by that point, the OFT had issued a statement of objections (and supplementary statement of objections), so that 'by this point the character of the administrative procedure was no less confrontational than ordinary civil proceedings' (*Tesco v OFT* (2012)). In *ENRC v SFO* (2018), the Court of Appeal clarified that litigation privilege may nevertheless apply in the context of regulatory investigations even before formal allegations had been made; for example, to documents created by organisations conducting internal investigations in contemplation of possible regulatory enforcement action.

Privilege against self-incrimination means that a person cannot be compelled to give answers that would require an admission that they have infringed the law. The CMA can, however, ask factual questions about documents that are already in existence and ask for them to be produced. It can also require individuals to attend formal interviews.

Confidentiality protection

37 | What confidentiality protection is afforded to the company and/or individual involved in competition investigations?

The CMA is allowed to name any companies that it is investigating and benefits from statutory privilege against defamation. The CMA's policy, however, is generally not to name the parties under investigation until a later stage of the investigation, typically once a statement of objections has been issued (CMA8).

The UK competition authorities are restricted from disclosing 'specified information' as defined under part 9 of the Enterprise Act 2002. This includes confidential information about a firm or an individual that the authority acquires in the exercise of any function it has under legislation, including the Competition Act 1998. 'Specified information' can only be disclosed in accordance within certain 'information gateways'. These include disclosure with the company's consent, where disclosure is required under EU law, to facilitate the exercise of a statutory function, in connection with criminal proceedings or disclosure to overseas public authorities for the purposes of certain types of investigation.

Refusal to cooperate

38 | What are the penalties for refusing to cooperate with the authorities in an investigation?

Failing to produce requested information within the deadline, providing false or misleading information, failing to attend a compulsory interview or obstructing an inspection can result in financial penalties. The first fine for failure to supply requested information was imposed on Pfizer in April 2016. The CMA fined Pfizer £10,000 for failing to provide underlying data for a claim that Pfizer made at an oral hearing. The CMA also fined Hungryhouse in 2017 for failing to provide information in the context of a merger investigation, and fined Fender £25,000 in 2019 because one of its employees concealed information potentially relevant to a Competition Act investigation.

Serious refusals to cooperate with the CMA (including knowingly or recklessly providing false information) may also be a criminal offence.

Infringement notification

39 | Is there a duty to notify the regulator of competition infringements?

There is no general duty to notify authorities of breaches of competition law, and the privilege against self-incrimination protects companies from being compelled to confess infringements (see question 36).

Firms that are regulated by the FCA – a concurrent competition enforcer – are required to notify it if they have or may have committed a 'significant infringement of any applicable competition law' (FCA Handbook).

Limitation period

40 | What are the limitation periods for competition infringements?

Competition enforcers are free to investigate historic conduct without any particular time limit. There are limitation periods, though, for bringing private 'follow-on' actions of six years in England, Wales and Northern Ireland, and five years in Scotland. The European Damages Directive and UK Implementing Regulations provide for suspensions of the limitation periods during investigations by competition enforcers.

MISCELLANEOUS

Other practices

41 | Are there any other regulated anti-competitive practices not mentioned above? Provide details.

In addition to compliance with EU and UK competition law, certain companies are required to comply with sectoral regulations (eg, in post, energy, transport and water).

Future reform

42 | Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

There is scope for substantial reforms as a result of the UK's withdrawal from the European Union. Possible changes will include:

- the European Commission's losing jurisdiction to investigate UK-specific conduct or agreements;
- decisions of the European Commission and Court of Justice no longer being binding on the CMA, CAT, and other UK courts; and
- UK competition authorities gaining the power to investigate mergers, and suspected competition law infringements that

currently fall to the exclusive jurisdiction of the European Commission.

Separately, the UK government has begun a review of the UK competition regime, which it was required to do five years after the most recent reforms to the regime came into effect in 2014. The government published a Green Paper for consultation on possible reforms in 2018. It also commissioned an expert inquiry into competition law in the digital sector (chaired by Professor Jason Furman), aimed at boosting competition and innovation in the digital sector. Possible reforms include strengthening the CMA's investigation powers, greater use of interim measures, adjustments to the substantive tests for assessing mergers in the digital sector and limiting rights of appeals to the CAT. At the time of writing, the government has not set out firm proposals for reform and the outcome of this review is likely to be influenced by the timing and terms of the UK's withdrawal from the EU.

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ISBN 978-1-83862-121-6