

Dominance 2020

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Patrick Bock and Kenneth Reinker

Cleary Gottlieb Steen & Hamilton LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Dominance*, 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.

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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, Patrick Bock and Kenneth Reinker of Cleary Gottlieb Steen & Hamilton LLP, for their continued assistance with this volume.



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GENERAL FRAMEWORK

Legal framework

- 1 | What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

Section 18 of the Competition Act 1998 states that 'any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom' (the Chapter II Prohibition).

The UK's withdrawal from the European Union took place on 31 January 2020. During the subsequent transition period, which is currently due to expire in December 2020, the provisions of article 102 of the Treaty on the Functioning of the European Union (TFEU) apply. In addition, during the transition period, UK competition authorities and courts are required to interpret the provisions of section 18 of the Competition Act 1998 consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission. The future relationship between the UK and the European Union -- including the interaction between their respective competition regimes -- is still to be negotiated.

One difference between EU and UK law is that, under the Chapter II prohibition, there is no need to show a cross-border effect, and there is no minimum market size threshold: a 'dominant position' refers to a dominant position in the United Kingdom or any part of the United Kingdom. This means that dominant positions can be found even for small suppliers in small geographic markets.

The Competition and Markets Authority (CMA) and sectoral regulators have regard to the European Commission guidance on its enforcement priorities in article 102 cases. In addition, the CMA has published its own guidance papers, including 'Abuse of a dominant position' (OFT 402), 'Assessment of market power' (OFT 415) and 'Market definition' (OFT 403).

Definition of dominance

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

A series of EU precedents define dominance as the power of an undertaking to behave to an appreciable extent independently of competitors, customers and ultimately consumers. This is consistent with the CMA's approach and UK precedents.

As a first step in the analysis, the CMA assesses the relevant product and geographic market (see question 9). It then considers whether the undertaking has 'substantial market power', taking into account 'market shares, entry conditions, and the degree of buyer power from the undertaking's customers'. If the undertaking 'does not face sufficiently strong competitive pressure' in the relevant market, it

may be treated as dominant. In other words, according to CMA guidance, 'market power can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels' (OFT 415, paragraph 3.1).

Purpose of the legislation

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

The standard is strictly economic. Non-competitive factors are not considered.

There are exemptions from abuse of dominance rules on non-economic grounds (eg, for reasons of public policy or international obligations).

Sector-specific dominance rules

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

Although sector-specific rules exist, they do not change the assessment of market power under article 102 of the TFEU or the Chapter II Prohibition.

Sectoral regulators with concurrent competition powers are generally required to pursue the objective of promoting competition within the sectors they regulate and must 'consider whether the use of their CA98 powers is more appropriate before using their sectoral powers' to achieve this objective (CMA Guidance CMA10, paragraph 4.1). This requirement is intended to strengthen the primacy of competition law.

Exemptions from the dominance rules

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

The rules on abuse of dominance apply to 'undertakings'. This is interpreted widely, encompassing every entity engaged in economic activity, regardless of the legal status of the entity or the way in which it is financed, in line with EU law. Therefore, if public bodies carry on an economic activity, they are subject to the abuse of dominance rules.

Exemptions from the Chapter II Prohibition exist for:

- undertakings that have been entrusted with carrying out 'services of general economic interest' (to the extent that the Chapter II Prohibition would prevent them from carrying out those services);
- mergers that are subject to EU or UK merger control rules;
- 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 II Prohibition in order to avoid a conflict with the UK's international obligations or for reasons of public policy.

In practice, the Secretary of State has only rarely exercised the power to exclude conduct from abuse of dominance rules. In 2007, the Secretary of State issued an exemption on security grounds relating to complex weaponry. This exemption was revoked in 2011.

Transition from non-dominant to dominant

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

Article 102 of the TFEU and the Chapter II Prohibition apply only to dominant firms.

Collective dominance

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

CMA guidance states that two companies can have 'collective dominance' if they 'are linked in such a way that they adopt a common policy on the market', following EU case law (eg, *Compagnie Maritime Belge*) (OFT 415, paragraphs 2.13 to 2.15). These links do not need to be structural.

An abuse of collective dominance may occur where a number of firms that together hold a dominant position take part in a tacitly agreed collective exclusionary or exploitative strategy. Cases involving collective dominance are rare, though, and no UK abuse of dominance cases have found the existence of 'collective dominance'.

In the case of *Brannigan v OFT*, a local newspaper owner alleged that two rival publishers had abused their collective dominance through exclusionary practices such as offering below-cost advertising. The Competition Appeal Tribunal (CAT) cited approvingly the *Airtours* test for collective dominance, namely that: the market is transparent; there are mechanisms to deter a departure from the alleged common policy; and it is impossible for competitors or customers to erode the advantages from the common policy. As regards the first limb, the Tribunal considered that it is not necessary to demonstrate price transparency in every case, in particular where the common policy related to coordinating on non-price factors, such as capacity. On the facts of the case, though, the Tribunal did not consider that collective dominance arose.

Dominant purchasers

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

The Chapter II Prohibition applies to dominant purchasers as well as dominant suppliers. In *BetterCare Group* (2003), the Office of Fair Trading (OFT), the CMA's predecessor, considered whether a potentially dominant purchaser of residential and nursing home care places – the North & West Belfast Health & Social Services Trust – had committed an abuse by offering excessively low prices and discriminating against private suppliers of residential care homes. The OFT found that 'in exceptional circumstances' (eg, where there are barriers to suppliers exiting the market), it could be abusive to pay excessively low prices. On the facts, the OFT found no evidence of abuse.

Market definition and share-based dominance thresholds

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

The approach to market definition is generally the same in abuse of dominance cases and merger investigations. It is consistent with the approach in EU law.

The relevant 'product market' includes the products and services that are regarded as 'interchangeable' or 'substitutable' by the customer (CAT judgment, *National Grid*, paragraph 34). To identify these substitute products, the CMA applies the 'hypothetical monopolist' test. This asks whether a hypothetical monopolist could profitably sustain a price that is a 'small but significant' amount (usually 5 to 10 per cent) above competitive price levels over a range of goods. If not, the market definition is widened to include the products that customers would switch to in response to a price increase. The same approach is used to identify the relevant 'geographic market', taking into account factors such as shipping costs and the mobility of customers.

Identifying the parameters of the relevant product market is a 'contextual' exercise and the 'hypothetical monopolist' test needs to be applied flexibly, taking account of the features of the sector concerned. For example, in *GlaxoSmithKline v CMA*, the CAT proposed a shifting market definition that would include other originator products during the period when GlaxoSmithKline's product benefitted from patent protection, but that excluded these other originators once generic versions of GlaxoSmithKline's product became potential competitors. This approach aimed to reflect the changed competitive dynamics once generic entry became a possibility, although the CAT referred its analysis to the Court of Justice for review, recognising that it had adopted a 'novel' approach. In January 2020, the Court of Justice confirmed that 'the interchangeability or substitutability of products are naturally dynamic, in that a new supply of products may alter the conception of the products considered to be interchangeable with a product already present on the market or as substitutable for that product and, in that way, justify a new definition of the parameters of the relevant market... a supply of generic medicines containing the same active ingredient, in this case paroxetine, could lead to a situation where the originator medicine is considered, in the professional circles concerned, to be interchangeable only with those generic medicines and, consequently, to belong to a specific market, limited exclusively to medicines which contain that active ingredient'.

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

CMA guidance also states that it is unlikely that an undertaking could be dominant if it has a market share below 40 per cent (OFT 402, paragraph 4.18). The Office of Communications (Ofcom)'s abuse of dominance investigation into BT in 2008 (NCCN 500) in exceptional circumstances found that BT was dominant with a market share of below 31 per cent. Ofcom stated that market shares were not 'a reliable indicator of whether or not BT can act independently of its competitors and customers' in this case, since BT's power came instead from the particular features of the market, including barriers to rivals expanding and inelastic demand for BT's services. Direct evidence showed that BT had not lost market share following price increases.

ABUSE OF DOMINANCE

Definition of abuse of dominance

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

Holding or acquiring a dominant position is not unlawful under UK competition law. A dominant company only infringes the Chapter II Prohibition or article 102 of the TFEU if it 'abuses' its dominance to restrict competition. For an abuse to occur, the relevant conduct needs to have been 'implemented'; it must not have been a mere 'preparatory act'. In late 2019, in *Royal Mail v Ofcom*, the CAT upheld Ofcom's finding

that the public announcement of an anti-competitive pricing policy was deemed to have been 'implemented', even though the contemplated prices were never charged (instead, they were suspended and then abandoned following Ofcom's decision to open an investigation).

'Abuses' fall into two main categories – conduct that 'exploits' customers directly (eg, charging excessive prices) and conduct that 'excludes' competitors from the market.

Certain types of conduct are categorised as 'by nature' infringements. Unless they are objectively justified, these forms of conduct are treated as infringing the Chapter II Prohibition without needing to show any anticompetitive effect, albeit an analysis of the relevant circumstances may be required, including rivals' efficiency. Following the Court of Justice ruling in *Intel*, the category of 'by nature' abuses is narrow. CMA guidance confirms that the 'likely effect' of a dominant undertaking's conduct is generally more important than its 'specific form' (OFT 402, paragraph 5.2).

For other types of conduct, case law establishes a need to show that anticompetitive effects are reasonably likely and the High Court has held that where conduct has been ongoing for some time, the actual effects on the market are 'a very relevant consideration' (*Streetmap v Google*). Moreover, the assessment of whether conduct is abusive should be looked at 'in the round', rather than seeking to identify on a narrow basis whether conduct is different from 'normal competition' (*National Grid*, Court of Appeal judgment, paragraphs 40 to 41).

Exploitative and exclusionary practices

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

Yes.

Link between dominance and abuse

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

As a general matter, the Chapter II Prohibition requires some link between an undertaking's dominant position and its abusive behaviour.

In *Flybe*, the OFT considered, but ultimately rejected, a theory of harm whereby Flybe was alleged to have entered a new route – on which it was not dominant – to strengthen its position on a separate market where it was dominant. Applying the case law from (among others) the EU judgment in *Tetra Pak II*, the OFT stated that conduct on a non-dominated market could be abusive, provided that:

- the conduct took place on 'closely associated markets' and is likely to protect or strengthen the position on the dominated market; or
- the conduct produces effects on the non-dominated market, provided special circumstances exist, in particular 'the existence of sufficiently proximate associative links between the markets in question'.

The OFT noted, however, that the case law on how closely linked the markets must be is not well developed. In the earlier case of *Burgess & Sons v OFT*, the CAT set out the principle that 'a dominant firm may be found to have committed an abuse in a neighbouring market in which it is not dominant if there are close links between the two associated markets.'

Defences

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

It is a defence for a dominant undertaking to show that its conduct was 'objectively justified', even if it restricted competition (OFT 402, paragraph 5.3). This applies both to 'by nature' abuses and other types of conduct. The dominant undertaking bears the burden of showing an objective justification.

Objective justifications are assessed in line with EU law. In *Streetmap v Google*, the High Court observed that 'it is open to the dominant undertaking to show that any exclusionary effect on the market is counter-balanced or outweighed by advantages that also benefit consumers'. These advantages or efficiencies may consist of 'technical improvements in the quality of the goods', not just 'economic considerations in terms of price or cost'.

The undertaking must also show that the conduct is 'proportionate' to achieving its objective. In other words, the conduct must be 'indispensable and proportionate' to the goal pursued, such that there are 'no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies' (*Streetmap v Google*). On the facts, the High Court found that Google's display of its own map in its search results, without including rival maps, improved quality and was objectively justified.

See also the exemptions from abuse of dominance rules.

Specific forms of abuse

14 | Rebate schemes

In line with EU law, rebates are generally categorised into three groups:

- Quantity discounts linked solely to the volume of purchases from the manufacturer are treated as presumptively lawful.
- 'Exclusivity' rebates have been treated as 'by nature' anticompetitive in several EU cases. Following the *Intel* case, though, dominant firms can submit evidence that the rebate was not capable of restricting competition. The Court clarified that the purpose of article 102 of the TFEU is not to protect less efficient competitors. The Commission is therefore required to consider the extent of the firm's dominance, the market coverage of the rebate, the conditions governing it, and the existence or otherwise of a strategy to exclude equally efficient competitors.
- 'Fidelity-building' rebates require an assessment of all the circumstances to analyse whether they make market entry very difficult or impossible and impede purchasers' ability to choose their sources of supply (eg, whether the rebates are retroactive or incremental; whether they are individualised or standardised; the length of the reference period), taking into account the market context (*Post Danmark II*).

In July 2015, the CMA closed a case concerning rebates in the 'fidelity-building' category in the pharmaceutical sector, sending a warning letter to the company concerned (Case CE/9855-14). The CMA made the following observations that offer general guidance:

- Retroactive rebates may exclude rivals from competing for 'contestable' orders if the discount is applied also to the 'non-contestable' share of orders that the customer wants or needs to place with the dominant firm.
- A retroactive rebate may result in a competitor having to offer a price below the dominant company's costs of production in order to compete for the contestable share, thereby excluding an 'equally efficient competitor'.

- Exclusionary concerns are exacerbated if the customer is able to 'reduce its overall expenditure on the dominant company's products by increasing the volume of contestable sales it purchases from the dominant company' (ie, where the dominant undertaking charges 'negative incremental prices'). This is the 'suction effect' of fidelity-building rebates.

In March 2019, the CMA closed its long-running investigation into discounts that Merck Sharp & Dohme Limited offered on its Remicade medicine. This case was novel, since it considered the possibility of certain discounts to restrict competition, even though the discounts in question were not conditioned on exclusivity and were not applied retroactively. Instead, the CMA was concerned that the discount system entailed a 'threat' to raise prices in the future if hospital trusts within a region failed to meet certain purchase volumes. On the facts of the case, the CMA found that the discounts at issue were not likely to foreclose generic rivals.

15 | Tying and bundling

Tying occurs when a supplier sells one product, the 'tying product', only together with another product, the 'tied product'.

Section 18(2)(d) of the Competition Act 1998 states that an abuse of dominance may consist of 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts'.

The elements of anticompetitive tying are the following:

- the tying and tied goods are separate products;
- the undertaking is dominant in the tying product market;
- customers have no choice but to obtain the tied and tying products together;
- the tying conduct forecloses competition; and
- there is no objective justification for the tie.

In *Genzyme*, the OFT alleged that the company had abused its dominance by offering its drug for treating Gaucher's disease together with its homecare services, under a single price. The CAT agreed that the drug and homecare services were distinct products that Genzyme was offering as a package for a single price. In principle, therefore, the drug and homecare products were tied together.

However, the CAT held that there was no abuse, as the OFT failed to show that the conduct would 'eliminate or substantially weaken competition'. There was no evidence that the NHS had wanted to obtain homecare services from a third party – it had not asked Genzyme to lower its drug prices to exclude the cost of homecare – and it was unclear that there was a way for Genzyme to unbundle the two products, given that no NHS body had proposed a separate contract to supply homecare services.

16 | Exclusive dealing

Following the Court of Justice ruling in *Intel*, an assessment of the circumstances and effects of an exclusivity arrangement is needed for it to be qualified as an abuse.

The UK competition authorities have challenged exclusivity agreements in a series of cases.

In 2014, the High Court held that Luton Airport's decision to grant National Express the exclusive right to operate a bus service from the airport to various London locations for seven years – combined with a right of first refusal on new routes – was anticompetitive (*Arriva v Luton Airport*).

In *National Grid*, the Court of Appeal upheld a finding that contracts for the provision of meter readers that lasted many years – coupled with

charges for early termination and a requirement to maintain a given proportion of National Grid's meters at the end of each year – were exclusionary.

In *EWS Coal Haulage Contracts*, the Office of Rail Regulation (ORR) found that EWS had entered into long-term agreements with the owners of power stations, in certain instances to supply all or almost all of their coal rail haulage. These agreements had a long duration – in one instance with a term of 10 years.

The CMA has also resolved cases concerning exclusivity through commitments. In *Epyx*, the duration of the agreements was reduced from three to seven years to 18 months and customers were allowed to place test orders with rival services. In *Western Isle Road Fuels*, five-year exclusivity agreements were made terminable on three months' notice. In *Calor Gas*, the OFT closed its investigation into exclusivity arrangements with LPG retailers, following a negotiated settlement whereby Calor Gas agreed to shorten its agreements from five years to two.

In the *Bunker Fuel* case, the CMA examined exclusivity arrangements in relation to the supply of cards entitling HGV drivers to purchase fuel at wholesale prices. Ultimately, the CMA closed the case on the basis that the product market was sufficiently wide that no party held a dominant position.

17 | Predatory pricing

Predatory pricing arises when a dominant company charges prices below its cost so that even equally efficient competitors cannot viably remain on the market.

A two-stage test applies to classify predatory pricing as abusive: pricing below 'average variable cost' (AVC) or 'average avoidable cost' (AAC) is presumptively abusive; and pricing below average total cost but above AVC or AAC is abusive if it is part of a plan to eliminate a competitor.

This approach has been followed in several UK cases, including findings of infringement in *Cardiff Bus*, involving the launch of a loss-making bus service (OFT decision, paragraphs 7.13 and 7.154 to 7.163); *Aberdeen Journals*, involving the sale of newspaper advertising space below the variable cost of producing the newspaper (CAT judgment, paragraphs 351 to 358); and *Napp Pharmaceuticals*, where Napp supplied morphine tablets to hospitals below cost in order to protect its position in the 'community segment' where clinicians generally prescribed the same drugs as those selected by hospitals (CAT judgment, paragraphs 207 to 216).

An important question is the timescale and output over which prices and costs are compared. In *Flybe*, the OFT found no grounds for action, even though Flybe's entry on a new flight route would be loss-making in the first year. A relevant consideration was that Flybe's internal documents indicated that it expected revenue to catch up with AAC in the second year and exceed AAC in the fourth year. Moreover, it was common in the airline industry that new routes would suffer losses initially. Losses in the first year alone were not therefore 'conclusive evidence of sacrifice' (OFT decision, paragraph 6.44).

The CMA or sectoral regulators with concurrent antitrust powers, might – depending on the facts of the case – consider alternative cost benchmarks when assessing pricing abuses. For example, in an investigation into certain pricing practices by British Telecom, the UK telecoms regulator, Ofcom, applied a cost measure that it described as 'CCA FAC [current cost account fully allocated costs] or long run incremental cost plus a mark-up for the recovery of common costs (LRIC+)'. Ofcom explained that it had 'taken as its benchmark for setting the margin, a new entrant today which has the same underlying cost function to BT (ie, similarly efficient) but enters later and benefits from fewer economies of scale and scope' (Direction Setting the Margin between IPStream and ATM interconnection Prices, Ofcom notice, paragraph 2.32).

In line with EU case law (in particular, *Tetra Pak II*), it is not necessary to prove that the dominant undertaking had the possibility to recoup its losses in order to find that pricing is predatory (OFT, *Cardiff Bus*, paragraph 7.251).

18 | Price or margin squeezes

A margin squeeze occurs when a vertically integrated company sells its own downstream product at a low price while supplying an input to downstream competitors at a price that prevents them from competing effectively. A margin squeeze abuse requires the following elements to be present (Court of Appeal judgment, *Albion Water*, paragraphs 88–90):

- the existence of two markets (an upstream market and a downstream market);
- a vertically integrated undertaking which is dominant on the upstream market and active (whether or not also dominant) on the downstream market;
- the need for access to an input from the upstream market in order to operate in the downstream market; and
- the setting of upstream and downstream prices by the dominant undertaking that leave an insufficient margin for an (equally) efficient competitor to operate profitably in the downstream market.

In *Albion Water*, the CAT found that Dŵr Cymru's own downstream business could not trade profitably on the basis of the upstream water transportation prices that it charged Albion Water (CAT judgment, paragraphs 871, 898 to 901).

19 | Refusals to deal and denied access to essential facilities

Dominant companies are generally free to decide whether to deal with a counterparty. In exceptional circumstances, a refusal by a dominant company to supply its products or grant access to its facilities can amount to an abuse, as established in EU law. For a refusal to supply to be unlawful, the following conditions must be met:

- supply is refused (the refusal can be express or constructive, ie, the dominant company insists on unreasonable conditions for granting access to the facility);
- the requested input must be indispensable (ie, it is an essential facility – the input is not 'indispensable' if there are 'less advantageous' alternatives);
- the refusal to supply is likely to eliminate competition in the downstream market; and
- the refusal to supply is not objectively justified.

If the refusal involves intellectual property, it must also be shown that the refusal to license would prevent the emergence of a new product.

In 2009, the ORR found that a refusal by the Association of Train Operating Companies (ATOC) to license a third party to access ATOC's database of real train time information (RTTI) was not abusive. The ORR found no evidence that a refusal to supply RTTIs to the complainant would prevent a new product from emerging, nor would it 'eliminate' all competition on the downstream market for RTTI applications. ATOC had already licensed non-exclusive access for two third parties that were producing downstream applications that had the same functionalities as those previously supplied by the complainant.

In *Burgess & Sons*, the OFT determined that a funeral director and owner of a crematorium (Austin & Sons) had not abused its dominant position by refusing to supply access to the crematorium to Burgess & Sons, a rival funeral director, who had previously been a regular user. On appeal, the CAT set aside the CMA's decision and decided on its own assessment that Austin & Sons had in fact held a dominant position, which it abused by withdrawing access to the crematorium from

Burgess & Sons. The CAT placed particular weight on the fact that no funeral directors in the local area could compete effectively without access to the crematorium operated by Austin & Sons. The refusal to supply would also have produced 'significant consumer detriment' since only two funeral directors would have remained following the exit of Burgess & Sons.

The High Court and Court of Appeal have considered the issue of refusals to license standard essential patents.

20 | Predatory product design or a failure to disclose new technology

Predatory product design is not a well-established category of abuse in UK competition law and the circumstances in which product design could be treated as anticompetitive are likely to be narrow.

In *Streetmap v Google*, the High Court considered allegations that Google had abused its dominant position in general search services by including a clickable Google Maps image on its search engine results page. The High Court held that since this product design was a procompetitive improvement in general search services (where Google was alleged to be dominant), any restrictive effect on competition in the related online maps market (where Google was not dominant) would need to be 'appreciable' for there to be a possible abuse.

Roth J explained that:

[I]t is axiomatic... that competition by a dominant company is to be encouraged. Where – as here – its conduct is pro-competitive on the market where it is dominant, it would to my mind be perverse to find that it contravenes competition law because it may have a non-appreciable effect on a related market where competition is not otherwise weakened. Accordingly, I consider that in the circumstances of the present case a de minimis threshold applies. For Google's conduct at issue to constitute an abuse, it must be reasonably likely to have a serious or appreciable effect in the market for on-line maps.

As regards failure to disclose new technology, the European Commission investigated an alleged 'patent ambush' by Rambus in which the company was accused of concealing the existence of its patents that were relevant to a standard for dynamic random access memory chips, and then charging high royalty rates for those patents. The case was ultimately settled through commitments in 2009. No such 'patent ambush' cases have been brought in the UK.

However, related to the issue of failing to disclose a new technology, the courts and competition authorities have considered failure to license essential technologies. In the patent infringement dispute *Unwired Planet v Huawei*, the High Court examined – but ultimately rejected – a claim that Unwired Planet committed an abuse of dominance by failing to offer a licence to standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms before seeking an injunction against Huawei. This follows a series of recent EU cases concerning abusive conduct by parties seeking injunctions in respect of SEPs without offering licences on FRAND terms to willing licensees (*Huawei v ZTE*, *Motorola and Samsung*). Both the High Court and the Court of Appeal in *Unwired Planet v Huawei* found that the procedure prescribed in *Huawei v ZTE* for negotiating SEP licence fees merely created a 'safe harbour', not mandatory conditions that a SEP owner had to follow to avoid a finding of abuse. The case has been appealed to the UK Supreme Court.

21 | Price discrimination

Section 18(2)(c) of the Competition Act 1998 identifies potentially unlawful price discrimination as 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'.

Abusive price discrimination requires proof that: equivalent situations are being treated in a non-equivalent manner (or vice versa) without legitimate commercial reasons; customers are placed at a competitive disadvantage relative to other trading parties to such a degree that risks foreclosing equally efficient competitors; and the difference in prices cannot be justified by difference in costs or other objective criteria.

In *EWS Coal Haulage Contracts*, the ORR found that EWS had engaged in discriminatory pricing by supplying coal haulage at different rates to different customers. It charged a higher price to one customer (ECSL) compared with other customers. This resulted in ECSL losing business. It was relevant that ECSL was also a competitor of EWS and internal documents showed that EWS' intention was to 'reduce the threat that ECSL posed to its position in the market for coal haulage' (¶B100).

In 2018, Ofcom fined Royal Mail £50 million for announcing price increases that it considered discriminatory and therefore abusive. These price changes meant that any of Royal Mail's wholesale customers seeking to compete with it by delivering letters in some parts of the UK, as Whistl was, would have to pay higher prices in the remaining parts of the country where they used Royal Mail to carry out delivery. According to Ofcom, the announced price changes deterred Whistl from competing with Royal Mail in the delivery of bulk mail.

In 2019, the CAT upheld Ofcom's decision. It followed the approach of the Court of Justice in *MEO*, recognising the need to consider 'whether Ofcom conducted a correct assessment of all the circumstances of the case to justify its findings of anti-competitive foreclosure and competitive disadvantage'; it did not infer competitive disadvantage from the application of dissimilar prices to equivalent transactions. Controversially, though, the CAT did not consider that Ofcom was required to carry out an AEC test in its assessment of 'competitive disadvantage', despite Royal Mail having submitted an AEC analysis during the administrative procedure.

Abuse of dominance rules also cover non-price discrimination. In 2011, the High Court found that Heathrow Airport unlawfully discriminated against rival valet service operators by requiring them to operate from airport car parks rather than terminal forecourts, where Heathrow Airport's in-house valet service operated (*Purple Parking v Heathrow Airport*). The relevant 'transaction' was the granting of access to Heathrow Airport for valet services, which was 'equivalent' for in-house and third-party providers. Requiring third-party valet services to operate from different locations amounted to applying 'dissimilar conditions'. It was necessary to show that Heathrow Airport's conduct 'has an anti-competitive effect felt by the consumer', which in the present case was met owing to reduced competition between operators, likely leading to higher prices.

In a separate airports case in 2014 (*Arriva v Luton Airport*), the High Court held that it was discriminatory for Luton Airport to permit easyBus to continue operating a service from the airport (as an exception to its award of exclusivity to National Express) while denying that possibility to Arriva.

22 | Exploitative prices or terms of supply

Section 18(2)(a) of the Competition Act 1998 refers to 'directly, or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.

The test for excessive pricing follows two stages: the difference between the dominant company's costs incurred and the price charged

is excessive; and the imposed price is either unfair in itself or when compared to the price of competing products. The Court of Appeal has established that 'the cost of compilation plus a reasonable return' only deals with the first limb of the test and is not therefore sufficient to show an unfair (and therefore abusive) price (*Attheraces*, paragraph 218).

Excessive pricing cases have traditionally been rare at the EU and UK levels, in part owing to the difficulty of defining the point when a price becomes 'excessive'. And in *Napp*, the excessive pricing allegation was tied closely to the claim of predation.

In December 2016, though, the CMA issued an infringement decision finding that Pfizer and Flynn Pharma had exploited their dominance in the manufacture and supply of phenytoin sodium capsules by charging excessive and unfair prices. In September 2012, Pfizer sold UK distribution rights for its Epanutin drug to Flynn, which de-branded the drug, thereby removing it from price regulation. Since September 2012, the CMA alleged that Flynn supplied the drugs to UK wholesalers and pharmacies at prices between 2,300 per cent and 2,600 per cent higher than those they had previously paid for the drug. According to the CMA 'patients who are already taking phenytoin sodium capsules should not usually be switched to other products, including another manufacturer's version of the product'. The NHS therefore had no alternative to paying the new higher prices.

Pfizer and Flynn appealed the finding of an infringement, arguing, inter alia, that the CMA applied an erroneous 'cost plus' measure, and ignored the fact that their product was sold at prices below relevant benchmarks, such as comparable phenytoin tablet products. The CAT agreed, annulling the CMA's infringement decision. In particular, the CAT criticised the CMA's determining the 'reasonable' rate of return by reference to the Pharmaceutical Price Regulation Scheme, which allows participants to make a 6 per cent profit on drugs they sold to the NHS. The CAT found that this cost-plus measure was designed to establish a benchmark of perfect or 'idealised' competition, not 'normal' competitive conditions. The 6 per cent figure in any event had a diminishing importance in the sector and applied to a supplier's portfolio of drugs – not a single drug in isolation, such as phenytoin capsules. Separately, the CAT criticised the CMA's failure properly to examine relevant comparators, such as Teva's phenytoin tablets, which were sold for a higher price than Pfizer's own phenytoin product. The CMA appealed the CAT's judgment and the case is pending before the Court of Appeal.

The CMA also has open investigations into excessive prices being charged for hydrocortisone tablets (Actavis) and Liothyronine tablets (*Concordia*). This is consistent with a greater focus on excessive pricing in the pharmaceuticals sector among other European antitrust agencies (as well as the European Commission) and the CMA's identification of healthcare and public services as an antitrust enforcement priority, though these cases may be delayed as a result of the *Pfizer/Flynn* appeal.

23 | Abuse of administrative or government process

UK competition authorities have investigated abuses of process as a form of abuse of dominant position, particularly in the pharmaceutical sector.

In *Gaviscon*, Reckitt Benckiser withdrew its Gaviscon Original product from sale to the NHS when the product no longer benefited from patent protection, replacing it with a similar (patent-protected) product, Gaviscon Advance. The OFT found that this made it more difficult for clinicians to prescribe generic alternatives to Gaviscon Original rather than Gaviscon Advance, owing to the configuration of the NHS computer system. The OFT imposed a fine of £10.2 million.

The CMA has also issued an infringement decision in relation to 'pay-for-delay' agreements whereby GlaxoSmithKline made payments to several generic drug producers, allegedly to delay their entry into

the market. These payments totalled more than £50 million and were made as part of a broader settlement of a patent infringement dispute. The CMA found that these agreements constituted an abuse of dominance and were also restrictive of competition under Chapter I of the Competition Act 1998 or article 101 of the TFEU.

The case is currently under appeal. The appellants argue that the CMA was wrong to categorise the agreements as 'by object' restrictions of competition. Moreover, GlaxoSmithKline had actually asserted its rights over paroxetine against generic manufacturers after they attempted to enter the market. Because GlaxoSmithKline won injunctions against the generic manufacturers, it was in a different position to patent holders who knew their patents might not prevent generic entry and paid generics suppliers to delay market entry.

Following a reference from the CAT, the Court of Justice confirmed that (i) In the context of patent disputes, generic suppliers that have a 'firm intention' and 'inherent ability' to enter are potential competitors, provided they do not face 'insurmountable' barriers (which does not include disputed patents); (ii) 'Reverse payment' settlements restrict competition 'by object' if (a) they can only be explained by an interest in avoiding competition on the merits, and (b) there are no pro-competitive effects casting doubt on this conclusion; (iii) 'Reverse payment' settlements can be qualified as restricting competition 'by effect' without needing to find that the generic supplier would otherwise have succeeded in the patent litigation; and (iv) concluding settlement agreements to exclude or delay generic entry can constitute an abuse of dominance, provided that strategy has 'exclusionary effects, going beyond the specific anticompetitive effects of each of the settlement agreements that are part of that strategy.'

24 | Mergers and acquisitions as exclusionary practices

See questions 5 and 6.

25 | Other abuses

Section 18 of the Competition Act 1998 lists examples of conduct that may be treated as abusive, though the categories of possible abuses are not closed or exhaustive. The *Gaviscon* and *GlaxoSmithKline* cases demonstrate that the CMA is willing to investigate new forms of conduct that it believes to be abusive. That said, the abusive nature of conduct cannot be simply asserted; it requires a full assessment of the conduct's effects on competition.

In October 2019, the CMA accepted commitments ending part of a two-year investigation into Aspen, a pharmaceutical producer. In October 2016, Aspen acquired the worldwide rights over Tiofarma's product for treating primary or secondary adrenal insufficiency, and withdrew Aspen's own version of the product from the market. The CMA provisionally concluded that the acquisition constituted an abuse of dominance, by removing the only source of competitive threat to Aspen's position as the sole UK supplier. Although the CMA and Aspen resolved the case through commitments, the case demonstrates the CMA's willingness to explore novel forms of abuse: acquisitions are typically reviewed under merger control rules rather than prohibitions on abuses of dominance or anticompetitive agreements. The European Commission has only rarely applied similar theories of harm in a handful of cases that pre-date the entry into force of the EU Merger Regulation in 1990.

ENFORCEMENT PROCEEDINGS

Enforcement authorities

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

The CMA is the primary public enforcer of abuse of dominance rules. In addition, the following regulators have concurrent powers to enforce competition law in their sectors:

- Civil Aviation Authority (air traffic and airport operation services);
- Financial Conduct Authority (financial services);
- NHS Improvement (healthcare services);
- Northern Ireland Authority for Utility Regulation (gas, electricity, water and sewerage services in Northern Ireland);
- Ofcom (electronic communications, broadcasting and postal services);
- Office of Gas and Electricity Markets (Ofgem) (gas and electricity);
- Office of Rail and Road (ORR) (railway services);
- Payment Systems Regulator (payment systems); and
- Water Services Regulation Authority (Water and sewerage).

The CMA and concurrent competition enforcers have extensive investigation powers, including issuing requests for information, which may result in penalty payments if the company does not respond in time (or at all). In April 2016, the CMA imposed a fine for the first time for failure to provide the requested information (Pfizer).

The CMA and concurrent regulators can conduct unannounced inspections ('dawn raids') at a company's premises, and it can require individuals to attend interviews provided they have a connection with a business which is a party to the investigation. They can also carry out inspections of private premises if the Court or CAT has issued a warrant.

Sanctions and remedies

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

The CMA and concurrent competition authorities have the following extensive powers to impose sanctions and remedies.

Fines

Fines can be up to 10 per cent of the undertaking's worldwide turnover in the past business year and are calculated according to the CMA's 2012 guidance (taking account of factors such as duration, aggravating or mitigating factors, deterrence, proportionality and settlement discounts) (OFT 423). The largest fine that the CMA has imposed for an abuse of dominance is the £84.2 million fine imposed on Pfizer for excessive pricing. The next largest fine is the £50 million penalty that Ofcom imposed on Royal Mail in relation to alleged discriminatory pricing.

An undertaking may be fined only if its conduct was intentional or negligent. Any undertaking whose turnover does not exceed £50 million benefits from immunity from fines for infringing the Chapter 2 Prohibition (but not article 102), although immunity may be withdrawn on a prospective basis.

Remedies

The CMA and concurrent competition authorities may issue directions as they consider appropriate to bring an abuse of dominance to an end, which can be enforced through the civil courts (sections 33 to 34, Competition Act 1998). The CMA has no power to impose structural remedies, although it is possible for an investigation to be closed on the basis of structural commitments (*Severn Trent*).

Individual sanctions

The CMA and concurrent competition authorities cannot sanction individuals directly for an abuse of dominance. They may, however, apply for a competition disqualification order that prevents an individual who was a director of an infringing company from being a company director for up to 15 years. The court must be satisfied that the individual's conduct makes him unfit to be a company director. Competition Disqualification Orders have not yet been applied in abuse of dominance cases.

Commitments

The CMA and concurrent competition authorities have the power to accept binding commitments from an undertaking to bring the suspected infringement to an end. An undertaking can thereby avoid a finding of an infringement and a fine. In the *Aspen* case (see question 25), the case resolution included a novel commitment by Aspen to pay £8 million in compensation to affected healthcare authorities who agreed to 'provide an assurance that this payment will be taken into account in the event of any follow-on damage proceedings'.

Enforcement process

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

The CMA and concurrent competition authorities can impose sanctions (as well as interim measures) directly.

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

The CMA's enforcement activity has grown considerably in recent years, particularly as market studies and investigations draw to a close, and enforcement remains a high priority. In a speech in November 2017, Dr Michael Grenfell, executive director of Enforcement, noted that the CMA had issued nine infringement decisions from April 2016 to March 2017 and from April to November 2017, it had issued three further infringement decisions and two commitment decisions.

Moreover, as Dr Grenfell noted in a speech in May 2018, the CMA opened 10 new antitrust cases per year in April 2016 to March 2017 and in April 2017 to March 2018 – a marked increase compared with the 6.8 competition cases opened per year by the OFT (the CMA's predecessor).

In June 2019, Dr Grenfell noted that the CMA managed, 'notwithstanding Brexit preparations, to launch eight new Competition Act investigations in the year to March 2019, only slightly down on the 10 we had launched in each of the two previous years. Less impressively, we issued only one infringement decision in the year, with £1.6 million of fines'. The low level of fines appears to reflect a backlog of ongoing cases in the pharmaceutical sector that require detailed investigation – in particular, cases involving alleged unfair prices, which may have been delayed by the ongoing *Pfizer/Flynn* appeal.

Indeed, the CMA's recent abuse of dominance probes have focused on the pharmaceutical sector, where the CMA has open investigations into issues such as excessive pricing and allegedly unlawful rebates. High-profile infringement decisions in the 'pay-for-delay' (*GlaxoSmithKline*), excessive pricing (*Pfizer/Flynn Pharma*) and price discrimination (*Royal Mail*) cases have resulted in high fines (£37.6 million on GlaxoSmithKline; £50 million on Royal Mail; and £84.2 million on Pfizer). By contrast, from 2012 to 2014, the OFT imposed only £65 million of fines in total.

CMA investigations vary significantly in duration, and no statutory deadlines apply. Very broadly, a CMA investigation is likely to take about three years (from case-opening until decision).

Contractual consequences

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

In *EWS Railway v E.ON*, the High Court held that contractual terms that infringed article 102 and the Chapter II Prohibition were void from the moment the contract was concluded. Because those clauses could not be severed, the contract as a whole was void and unenforceable in that particular case.

Private enforcement

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

Two types of private action exist in the United Kingdom: follow-on actions and stand-alone actions. A follow-on action for damages is founded on an infringement decision by a UK competition authority or the European Commission, which binds the Court or the CAT. The claimant therefore only needs to show loss and causation. In a stand-alone action, the claimant must also prove that the defendant infringed competition law.

Since October 2015, stand-alone actions and follow-on actions can be brought before the CAT as well as the civil courts, both of which have jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality.

The CAT also has the power to admit collective actions for damages on an opt-in or opt-out basis (a 'collective proceedings order'). The claimant has to show that it is a suitable representative and that the claims in question are sufficiently similar to be brought in collective proceedings.

UK Regulations implementing the EU Damages Directive address limitation periods for bringing private actions (ie, six years from the date that the infringement ceased or the claimant knew – or could reasonably be expected to know – of the infringement, subject to certain provisions suspending the limitation period). The UK Regulations also address disclosure and the weight to be afforded to findings of competition authorities and courts in other EU member states. The UK Regulations apply to violations of both EU and UK competition law.

EC decisions taken before Brexit may form the basis for future follow-on claims in the UK courts, even if they are still subject to appeal. Post-Brexit, EC decisions that are not binding in the UK may nonetheless provide the basis for a foreign law tort claim before the English courts, provided there is a jurisdictional nexus to the UK.

Damages

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

Damages in competition claims are intended to be compensatory: they are intended to place the victim in the position he or she would have been in had the infringement not occurred.

In exceptional circumstances, where compensatory damages would be an inadequate remedy, damages may, in principle, be awarded on a restitutionary basis (ie, an account of the profits earned unjustly by the defendant), although this has not happened in practice.

UK Regulations that implement the EU Damages Directive prohibit awards of exemplary damages in antitrust actions. Previously, exemplary damages had been awarded in *Cardiff Bus*.

Appeals

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

Any person who is found to have infringed article 102 or the Chapter II Prohibition by the CMA or a concurrent UK competition authority has a right of appeal to the CAT, which can hear appeals on points of fact or law. Further appeals (on points of law) can be made to the Court of Appeal.

NON-DOMINANT FIRMS**Unilateral conduct by non-dominant firms**

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

No.

UPDATE AND TRENDS**Forthcoming changes**

- 35 | Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

There has been much recent discussion about whether the CMA is well-equipped to promote competition in the digital sector, and whether changes or supplements to the existing competition regime are needed. The government appointed a Digital Competition Expert Panel to review these issues, whose report – 'Unlocking Competition in Digital Markets' – included a proposal for a new Digital Markets Unit that would enforce a code of conduct in respect of digital platforms deemed to have 'strategic market status'. The contemplated code of conduct includes rules addressing conduct that has – thus far – been reviewed under the abuse of dominance standard, such as the use of most-favoured-nation clauses or 'self-preferencing'.

Further proposals for a digital code of conduct were discussed in the CMA's interim report in its market study into digital advertising. Depending on how these proposals are taken forward, several practices could fall to be addressed under the contemplated code of conduct alongside – or instead of – the Chapter II Prohibition.

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