# Dominance

*Contributing editors*
**Patrick Bock, Kenneth Reinker and David R Little**

2018

GETTING THE DEAL THROUGH

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**Cleary Gottlieb Steen & Hamilton LLP**



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# Preface

## Dominance 2018

Fourteenth edition

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

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Belgium, Saudia Arabia, Sweden and Taiwan.

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

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

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2018

# United Kingdom

**David R Little and Alexander Waksman**
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## General questions

### 1 Legal framework

**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).

As long as the United Kingdom remains a member state of the European Union, the provisions of article 102 of the Treaty on the Functioning of the European Union (TFEU) also apply. UK competition authorities and courts are required to interpret the provisions of section 18 of the Competition Act 1998 consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.

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

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

### 2 Definition of dominance

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

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

As a first step in the analysis, the CMA assesses the relevant product and geographic market (see question 9). It then considers whether the undertaking has 'substantial market power', taking into account 'market shares, entry conditions, and the degree of buyer power from the undertaking's customers'. If the undertaking 'does not face sufficiently strong competitive pressure' in the relevant market, it may be treated as dominant. In other words, according to CMA guidance, 'market power can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels' (OFT 415, paragraph 3.1).

### 3 Purpose of the legislation

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

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

As explained in response to question 5, there are exemptions from abuse of dominance rules on non-economic grounds (eg, for reasons of public policy or international obligations).

### 4 Sector-specific dominance rules

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

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

Sectoral regulators with concurrent competition powers (see question 26) are generally required to pursue the objective of promoting competition within the sectors they regulate and must 'consider whether the use of their CA98 powers is more appropriate before using their sectoral powers' to achieve this objective (CMA Guidance CMA10, paragraph 4.1). This requirement is intended to strengthen the primacy of competition law.

### 5 Exemptions from the dominance rules

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

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

Exemptions from the Chapter II Prohibition exist for:

- 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.

### 6 Transition from non-dominant to dominant

**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.

### 7 Collective dominance

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

CMA guidance states that two companies can have 'collective dominance' if they 'are linked in such a way that they adopt a common

policy on the market', following EU case law (eg, *Compagnie Maritime Belge*) (OFT 415, paragraphs 2.13 to 2.15). These links do not need to be structural.

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

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 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.

### 8 Dominant purchasers

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

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

### 9 Market definition and share-based dominance thresholds

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

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

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

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

CMA guidance also states that it is unlikely that an undertaking could be dominant if it has a market share below 40 per cent (OFT 402, paragraph 4.18). The Office of Communications (Ofcom)'s abuse of dominance investigation into BT in 2008 (*NCNN 500*) in exceptional circumstances found that BT was dominant with a market share of below 31 per cent.

## Abuse of dominance

### 10 Definition of abuse of dominance

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

Holding or acquiring a dominant position is not unlawful under UK competition law. A dominant company only infringes the Chapter II Prohibition or article 102 TFEU if it 'abuses' its dominance to restrict competition. 'Abuses' fall into two main categories – conduct that 'exploits' consumers directly (eg, charging excessive prices) and conduct that 'excludes' competitors from the market.

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

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

### 11 Exploitative and exclusionary practices

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

Yes.

### 12 Link between dominance and abuse

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

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

In *Flybe* the OFT considered a theory of harm whereby Flybe was alleged to have entered a new route – on which it was not dominant – to strengthen its position on a separate market where it was dominant. The OFT stated that conduct on a non-dominated market could be abusive, provided that:

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

The OFT noted, however, that the case law on how closely linked the markets must be is not well developed.

### 13 Defences

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

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

Objective justifications are assessed in line with EU law. In *Streetmap v Google* the High Court observed that 'it is open to the dominant undertaking to show that any exclusionary effect on the market is counter-balanced or outweighed by advantages that also benefit consumers'. These advantages or efficiencies may consist of 'technical

improvements in the quality of the goods', not just 'economic considerations in terms of price or cost'.

The undertaking must also show that the conduct is 'proportionate' to achieving its objective. In other words, the conduct must be 'indispensable and proportionate' to the goal pursued, such that there are 'no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies' (*Streetmap v Google*).

See also the exemptions from abuse of dominance rules (see question 5).

## Specific forms of abuse

### 14 Rebate schemes

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

- Quantity discounts linked solely to the volume of purchases from the manufacturer are treated as presumptively lawful.
- 'Exclusivity' rebates have been treated as 'by nature' anticompetitive in several EU cases. 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 and all the relevant circumstances (*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.

### 15 Tying and bundling

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

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

The elements of anticompetitive tying are the following:

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

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

However, the CAT held that there was no abuse, 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

Exclusivity arrangements have been treated as restricting competition by their very nature. They therefore do not require proof of restrictive effects (although see response to question 14 concerning the Court of Justice in *Intel*).

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

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

In *National Grid* the Court of Appeal upheld a finding that contracts for the provision of meter readers that lasted many years – coupled with charges for early termination and a requirement to maintain a given proportion of National Grid's meters at the end of each year – were exclusionary.

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

The CMA has also resolved cases concerning exclusivity through commitments. In *Epyx* the duration of the agreements was reduced from three to seven years to 18 months and customers were allowed to place test orders with rival services. In *Western Isle Road Fuels* five-year exclusivity agreements were made terminable on three months' notice.

### 17 Predatory pricing

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

A two-stage test applies to classify predatory pricing as abusive: 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 was 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 LRIC+

[long run incremental cost plus a mark-up for the recovery of common costs]'. Ofcom explained that it had 'taken as its benchmark for setting the margin, a new entrant today which has the same underlying cost function to BT (ie, similarly efficient) but enters later and benefits from fewer economies of scale and scope' (Direction Setting the Margin between IPStream and ATM interconnection Prices, Ofcom notice, paragraph 2.32).

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

### 18 Price or margin squeezes

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

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

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

### 19 Refusals to deal and denied access to essential facilities

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

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

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

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

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

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

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

Roth J explained that:

> *[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.

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 alleged an abuse of dominance by the claimant for failing to offer a licence to standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. This follows a series of recent EU cases concerning abusive conduct by parties seeking injunctions in respect of SEPs without offering licences on FRAND terms to willing licensees (*Huawei v ZTE*, *Motorola* and *Samsung*).

### 21 Price discrimination

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

Abusive price discrimination requires proof that: 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 (iii) the difference in prices cannot be justified by difference in costs or other objective criteria.

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

Abuse of dominance rules also cover non-price discrimination. In 2011, the High Court found that Heathrow Airport unlawfully discriminated against rival valet service operators by requiring them to operate from airport car parks rather than terminal forecourts, where Heathrow Airport's in-house valet service operated (P*urple Parking v Heathrow Airport*):

- The relevant 'transaction' was the granting of access to Heathrow Airport for valet services, which was 'equivalent' for in-house and third-party providers.
- Requiring third-party valet services to operate from different locations amounted to applying 'dissimilar conditions'.
- It was necessary to show that Heathrow Airport's conduct 'has an anticompetitive effect felt by the consumer', which in the present case was met owing to reduced competition and likely higher prices.

### 22 Exploitative prices or terms of supply

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

The test for excessive pricing follows two stages: 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 excessive price (*Attheraces*, paragraph 218).

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

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

Pfizer and Flynn have appealed, arguing, inter alia, that the CMA applied an erroneous 'cost plus' measure, and ignored the fact that their product was sold at prices below relevant benchmarks, such as comparable phenytoin tablet products.

The CMA also has an open investigation into excessive prices being charged for hydrocortisone tablets (*Actavis and 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.

### 23 Abuse of administrative or government process

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

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

The CMA has also issued infringement decisions in relation to 'pay-for-delay' agreements whereby GlaxoSmithKline (GSK) made payments to several generic drug producers, allegedly to delay their entry into the market. These payments totalled more than £50 million and were made as part of a broader settlement of a patent infringement dispute. The CMA challenged these agreements on the basis that they constituted an abuse of dominance and were also restrictive under Chapter I 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, GSK had actually asserted its rights over paroxetine against generic manufacturers after they attempted to enter the market. Because GSK won injunctions against the generic manufacturers, it was in a different position to patent holders who knew their patents might not prevent generic entry and paid generics suppliers to delay market entry.

### 24 Mergers and acquisitions as exclusionary practices

See questions 5 and 6.

### 25 Other abuses

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

## Enforcement proceedings

### 26 Enforcement authorities

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

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

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

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

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

### 27 Sanctions and remedies

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

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

**Fines**

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

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

**Remedies**

The CMA and concurrent competition authorities may issue directions as they consider appropriate to bring an abuse of dominance to an end, which can be enforced through the civil courts (sections 33 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).

**Update and trends**

The European Union (Withdrawal) Bill is currently progressing through parliament. It will – in its final form – likely govern the status of European law (including pre-existing decisions in the competition sphere) and whether the CMA and UK courts should continue to align their decisions with (or take account of) developments in EU antitrust. Moreover, Brexit is likely to result in the CMA focusing on high-profile cases compared to its current mix of larger and local infringements. It also raises the possibility of the CMA investigating in parallel conduct that is subject to European Commission proceedings.

Enforcement practice has, in recent years, been focused on the pharmaceutical sector. This is not expected to change, as the CMA may consider that cases involving the National Health Service are in line with the CMA's prioritisation principles (CMA16), which emphasise consumer welfare. That said, there are recent indications the CMA will focus on conduct and agreements in the technology sector. In November 2017, Michael Grenfell, Executive Director of Enforcement, stated that the CMA has 'been looking at a range of competition issues in digital sectors, and continue to do so – including online sales bans, resale price maintenance for internet sales, 'most favoured nation' provisions in price comparison websites'.

In terms of procedure, the CMA has the power to adopt interim measures in cases presenting an urgent risk of serious harm. In a recent case concerning auction houses, the CMA received an application for – and considered – interim measures in its investigation into 'suspected exclusionary and restrictive pricing practices, including most favoured nation provisions in respect of online sales'. However, the CMA has indicated it will consider whether interim measures might be appropriate to prevent irreparable anticompetitive practices from stifling competition in fast-moving online markets. A further important procedural development was the first use of a 'fast-track' trial procedure in *Socrates v Law Society*, whereby a legal training services provider successfully claimed that the Law Society had abused its dominant position. This case could pave the way for future standalone competition actions.

**Individual sanctions**

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

**Commitments**

The CMA and concurrent competition authorities have the power to accept binding commitments from an undertaking to bring the suspected infringement to an end. An undertaking can thereby avoid a finding of an infringement and a fine.

### 28 Enforcement process

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

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

### 29 Enforcement record

**What is the recent enforcement record in your jurisdiction?**

The CMA's enforcement activity has grown considerably in recent years, particularly as market studies and investigations draw to a close, and enforcement remains a high priority. In a speech in November 2017, 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:

> *And in the eight months since April 2017 we've issued three infringement decisions – plus two other cases where we made decisions to accept commitments.*

As of March 2017, the CMA had 15 open antitrust cases (in which no infringement, commitment or other final decision has been taken).

Recent abuse of dominance probes have focused on the pharmaceutical sector, where the CMA has open investigations into issues like excessive pricing and allegedly unlawful rebates. The recent high-profile infringement decisions in the 'pay-for-delay' (*GlaxosSmithKline*) and excessive pricing (*Pfizer/Flynn Pharma*) cases resulted in high fines (£37.6 million on GlaxoSmithKline and £84.2 million on Pfizer). By contrast, from 2012 to 2014 the CMA imposed only £65 million of fines in total.

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

### 30 Contractual consequences

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

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

### 31 Private enforcement

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

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

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

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

UK draft Regulations that seek to implement the EU Damages Directive will address limitation periods for bringing private actions, disclosure, and the weight to be afforded to findings of competition authorities and courts in other EU member states.

### 32 Damages

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

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

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

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

**33 Appeals**

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

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

**Unilateral conduct**

**34 Unilateral conduct by non-dominant firms**

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

No.

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