ANTIMONOPOLY & UNILATERAL CONDUCT 2020 KNOW HOW

United Kingdom

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GCR INSIGHT

Overview

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

The prohibition of the abuse of a dominant position is contained in section 18(1) of the Competition Act 1998 (the Act), which provides 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". This is commonly known as the Chapter II prohibition. It is substantially the same as article 102 of the Treaty on the Functioning of the European Union (TFEU), save that the requirement for an effect on trade is within the UK. In light of the Modernisation Regulation 1/2003, the UK competition authorities (see question 2) also have the power to apply article 102 TFEU.

Further, there are also sector specific regulations (outside of competition law) that regulate market power (eg, the notion of "significant market power" in the telecommunications sector).

For these purposes we focus on the Chapter II prohibition.

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

The Competition and Markets Authority (CMA) is primarily responsible for the investigation and enforcement of the Chapter II prohibition. In addition, certain sectoral regulators have concurrent (parallel) powers within their sector. These are:

- the Civil Aviation Authority (CAA);
- NHS Improvement (the Healthcare Services Regulator);
- the Northern Ireland Authority for Utility Regulation (NIAUR);
- the Office of Communications (Ofcom);
- the Gas and Electricity Markets Authority (Ofgem);
- the Water Services Regulation Authority (Ofwat);
- the Office of Rail and Road (ORR);
- the Financial Conduct Authority (FCA); and
- the Payment Services Regulator (PSR).

Monopoly power

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

In line with EU law, market definition is one of the first stages of establishing whether an undertaking is dominant.

4 What is the approach to market definition?

The CMA's Guideline "Market Definition" (OFT 403, December 2004), which sectoral regulators broadly follow, states that its approach to market definition is similar to that of the European Commission. It includes an assessment of both the relevant product and geographic markets.

To establish the relevant product market, the CMA applies a "hypothetical monopolist test" to products under investigation by considering the other products or services that customers would switch to if the hypothetical monopolist increased prices above a competitive level by a small but significant amount. If the reaction of customers to the price rise is to switch to them in sufficient volumes, then the market definition is widened to include those products. The process is repeated until a set of products is reached for which such a price increase would allow for a stable industry-wide increase in profits. Substitutability may be considered from the demand and supply side.

The geographic market is the area within which customers would be willing to source alternative products in response to an imaginary price increase. This requires a consideration of supply and demand side factors. The relevant geographic market may be national (ie, the UK) or smaller than the UK (eg, local or regional), wider than the UK (eg, part of Europe including the UK) or even worldwide.

The Competition Appeal Tribunal (CAT) has emphasised that market definition is a tool for determining the question of dominance, not an end in itself (which is consistent with the Guideline above). In its view, market definition is also contextual; it may vary depending on the nature of the conduct under scrutiny as well as over time (GSK and ors v CMA [2018] CAT 4).

5 How is market power or monopoly power defined?

The CMA's Guideline "Assessment of market power" (OFT 415, December 2004) (the Market Power Guideline) provides that market power arises where an undertaking does not face effective competitive pressure and has the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels.

6 What is the test for finding of monopoly power?

The Market Power Guideline provides that an undertaking will not be dominant unless it enjoys "substantial market power". An assessment of market power generally involves considering a wide range of relevant evidence on market definition, market structure, entry conditions, the behaviour of undertakings and their financial performance.

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

There is no mechanical test set out in case law or statute. A conceptual framework has been developed by the CMA in the Market Power Guideline and is broadly described in the responses to questions 8 to 22.

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

The consideration of market shares over time is important when assessing market power, however, it is not the only factor. In the Market Power Guideline, the CMA provides that market shares alone might not be a reliable guide to market power and that an analysis of entry conditions and other factors is equally important.

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

There are no defined market share thresholds for a presumption of market power. In the Market Power Guideline, the CMA recognises that there is a presumption of dominance if an undertaking has a market share persistently above 50 per cent. The CMA considers that it is unlikely, although it cannot be excluded, that dominance will be established below 40 per cent.

10 How easily are presumptions rebutted?

This will depend on the facts of the case. By way of illustration in National Grid the CAT treated a market share of 89 per cent as one indicator of market power but as not raising any particular presumption of the existence of dominance (National Grid v Gas And Electricity Markets Authority [2009] CAT 14). Similarly, in Socrates the CAT held that the Law Society's 100 per cent share of the market for the supply of accreditation to residential conveyancing law firms was relevant but did not automatically mean it had significant market power. The CAT went on to consider whether the Law Society's product was essential or a "must-have" for law firms and whether there was countervailing power before concluding that as a result of both these factors the Law Society was indeed in a dominant position (from the date that its product became a "must-have") (Socrates Training v Law Society of England and Wales [2017] CAT 10).

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

Please see response to question 10.

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

In NCCN 500, Ofcom found that BT, with a market share below 31 per cent, was dominant as there were additional factors to indicate dominance, such as significant barriers to expansion and insufficient constraints from competing suppliers and from customers (Ofcom decision of 1 August 2008).

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

One of the competitive constraints upon an undertaking comes from potential competition and entry and expansion barriers are relevant to this issue (the Market Power Guideline). The lower the barriers, the more likely it is that potential competition will prevent undertakings on the market from profitably sustaining prices above competitive levels.

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

Potentially. As pointed out in paragraph 5.4 of the Market Power Guideline: "[A]n undertaking even with a large market share in a market with very low entry barriers would be unlikely to have market power. However, an undertaking with a large market share in a market protected by significant entry barriers is likely to have market power."

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

There are various barriers to entry that are considered in the analysis including:

- poor access to key inputs and key distribution outlets (for example, to intellectual property rights or to an essential facility);
- significant regulation (for example, a limit on the number of undertakings licensed to operate on a market);
- high sunk costs (for example, costs to enter the market that are not recoverable on exiting the market);
- exclusionary behaviour (for example, a refusal to supply a product or service); and
- state of contestable market (structure of the market and nature of agreements for supply).

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

Countervailing buyer power may constrain market power. This will depend on the facts in each case, in particular the strength of buyers and the structure of the buyers' side of the market (the Market Power Guideline). The CAT has clarified that the question is not whether or not there is countervailing power, but the degree and extent to which it constrains the dominant undertaking's ability to exert market power (Hutchison 3G UK Limited v Ofcom [2005] CAT 39). There must be a real possibility that this pressure will be exercised in practice and to a sufficient extent (Pfizer/Flynn v CMA [2018] CAT 11).

17 What if consumers can easily switch between suppliers?

If consumers are well informed about alternative sources of supply and could readily, and at very little cost, switch between suppliers, this can be decisive to the degree of market power (or lack thereof).

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

There is no defined list of factors to assess market power. Other factors could include:

- the behaviour and performance of an undertaking, where there is direct evidence that, over the long term, prices substantially exceed relevant costs or profits substantially exceed competitive levels; and
- economic regulation, where, for example, prices and/or service levels are subject to controls by the government or an industry sector regulator. While economic regulation is not a competitive constraint in itself, it can limit the extent to which undertakings can exploit their market power.

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

The Act excludes the application of the Chapter II prohibition to the following:

- mergers or joint ventures subject to UK or EU merger control;
- an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition obstructs performance of its assigned tasks;
- conduct engaged in to comply with a legal requirement;
- conduct specified in an order of the Secretary of State and necessary to avoid a conflict with the UK's international obligations; and
- conduct specified in an order of the Secretary of State where there are exceptional and compelling reasons of public policy why the Chapter II prohibition should not apply.

20 Can companies be deemed to hold collective monopoly power?

Yes. In the CMA's Guideline "Abuse of a dominant position" (OFT 402, December 2004) (the Abuse Guideline), the CMA notes that a dominant position need not be held by a single undertaking. A dominant position may be held collectively when two or more legally independent undertakings are linked in such a way that they adopt a common policy on the market. These links need not be structural.

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

As the Chapter II prohibition applies to "one or more" undertakings, the exercise of joint monopoly power could in principle be treated as an infringement of the Chapter II prohibition.

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

Yes. The CMA (through its predecessor the OFT) and sectoral regulators have published the following guidance documents on market definition and/or assessing market power:

- Assessment of market power (OFT 415, December 2004);
- Market Definition (OFT 403, December 2004);
- Application in the Energy Sector (OFT 428, January 2005);
- Competition Act 1998 guidance (ORR, March 2016);
- Market power test guidance (CAP 1433, August 2016); and
- Guidance on Ofwat's approach to the application of the CA98 in the water and wastewater sector in England and Wales (Ofwat, March 2017).

Abuse of monopoly power

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

Section 18 of the Act contains the general prohibition (see question 1), which largely mirrors article 102 TFEU and sets out a non-exhaustive list of what could constitute abusive conduct (see question 25) without defining what an abuse is.

24 What are the general conditions for finding an abuse?

There are no general conditions. According to the Abuse Guideline, the CMA will decide whether conduct amounts to an abuse after detailed examination of the market concerned and the effects of the undertaking's conduct.

The High Court has clarified that the assessment of whether conduct amounts to an abuse must be made in the round and not by 'pigeon-holing' conduct into a particular category of abuse (Purple Parking v Heathrow Airport [2011] EWHC 987 (Ch)).

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

Section 18(2) of the Act lists (non-exhaustive) examples of conduct that may be abusive. These include:

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

26 Is this list open or closed?

Open (see response to questions 23 and 24).

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

The CMA (in its previous form as the OFT) has issued the Abuse Guideline. However, it deals only briefly with abuse and mainly refers to article 102 TFEU and section 18 of the Act. The sectoral guidance listed in question 22 and the guideline 'Application of CA98 in the healthcare sector' (Monitor, September 2014) also (briefly) cover abuse.

In practice the UK competition authorities have had regard to the European Commission's 'Guidance on Article 102 Enforcement Priorities' (2009/C45/02) and referred to it in a number of cases. In Purple Parking, the High Court, however, did not place any weight on the European Commission's guidance.

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

The Abuse Guideline emphasises an effects-based approach and states that "the likely effect of a dominant undertaking's conduct on customers and on the process of competition is more important to the determination of an abuse than the specific form of the conduct in question." It goes on to state that conduct may be abusive where, through the effects of the conduct on competition, it adversely affects consumers. In practice, the UK competition authorities and courts have generally taken an effects-based approach.

That said, the UK competition authorities and courts are bound to have regard to EU case law, where certain types of abuse may be considered to be restrictive by their very nature. In Streetmap v Google [2016] EWHC 253 (Ch) the High Court gave the example of predatory pricing as a classic form of abuse where an anticompetitive effect may be presumed.

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

In Streetmap v Google, the High Court considered EU case law and found that the relevant test was whether the conduct in question was reasonably likely to harm the competitive structure of the market. In determining this question, the court would nonetheless take into account evidence as to the actual effect of the conduct.

The High Court held that in circumstances where the conduct on the dominated market was pro-competitive, a different degree of effect was required where the likely effect of the conduct was on a non-dominated market, in which case the effect on competition must be appreciable (see question 46). The court distinguished this from cases considered in EU case law, in particular Post Danmark II (EU:C:2015:651), according to which no serious or appreciable effect is required, on the basis that in such cases the potential anticompetitive effect was on the market on which the undertaking was dominant and competition was therefore already weakened by the presence of the dominant undertaking. The approach in Streetmap v Google was followed in Socrates and Network Rail (see question 61).

The more general point above about appreciable effect now needs to be considered in light of the effects-based approach indicated by the CJEU's judgment in Intel (EU:C:2017:632).

30 Does the abusive conduct need to harm consumers?

The Abuse Guideline specifies that the CMA will have regard to the likely effect of the conduct on customers and the process of competition, and in particular whether, through the effects on the competitive process, consumers are directly or indirectly adversely affected. It is therefore a key consideration in the enforcement of the Chapter II prohibition and in the assessment of the effect of the conduct on competition. However, there is no requirement for it to be established separately from the effect on competition: this was explicitly clarified by the CAT in Socrates.

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

A dominant undertaking can defend an allegation of abusive conduct by establishing that its conduct was objectively justified (see questions 32 and 33).

32 Can abusive conduct be objectively justified?

Both the Abuse Guideline and case law recognise that a dominant undertaking can defend itself against an allegation of abuse by showing that it has an objective justification for its conduct. The conduct in question must nonetheless be proportionate. In this regard the High Court has stated that the defence is not available if there are alternative, non-abusive solutions to the problem (Dahabshiil Transfer Services v Barclays [2013] EWHC 3379 (Ch)). The CAT took a similar approach in Network Rail.

33 What objective justifications have been successful?

A variety of types of objective justifications have been acknowledged by UK competition authorities and courts. These include:

- the use of short-run promotions for the launch of a new product, supported by evidence of legitimate commercial reasons for the launch, in response to an accusation of predatory pricing;
- that the supply of the relevant service would have been unlawful in light of the regulatory regime, in response to an accusation of refusal to supply;
- evidence of an efficiency rationale, including avoiding an economically inefficient investment, in response to an allegation of margin squeeze; and
- prevention of congestion, safety, security and environmental considerations.

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

The burden of establishing a dominant position and abuse of that dominant position rests on the UK competition authority seeking to enforce and/or the claimant seeking to invoke the Chapter II prohibition. It is for the undertaking accused of abusing its dominant position to show that its conduct was objectively justified.

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

Section 18(2)(d) of the Act provides that an abuse may consist in making the conclusion of contracts subject to acceptance by the other party of supplementary obligations that have no connection with the subject of the contracts (by their nature or according to commercial usage).

In Socrates, the CAT clarified that section 18(2)(d) will not only apply where there is "no connection" between the tying and tied products, in spite of the wording of section18(2)(d). The CAT held, consistently with EU case law, that there may be an abuse even where the tying of two products is consistent with commercial usage or there is a natural link between the two products. It then considered whether (i) there were two distinct products, since it is a necessary element of an abusive tie that the tying and tied products are distinct; and (ii) the conduct may have an anticompetitive effect (applying the test set out in question 29).

As regards bundling, in Genzyme, the CAT held that the bundling by a dominant undertaking of separate but ancillary products or services could constitute an abuse where the effect was to eliminate or substantially weaken competition in the supply of the ancillary services or products (Genzyme v OFT [2004] CAT 4). It also noted that it was not necessary for the dominant undertaking to be dominant in both the upstream and downstream markets. In that instance, it overturned the OFT's finding of abuse on the grounds that the OFT had not proved a sufficiently adverse effect on competition.

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

In JJ Burgess & Sons v OFT [2005] CAT 25 the CAT summarised the UK case law as follows:

- an abuse may occur where a dominant undertaking, without objective justification, refuses to supply an established existing customer who abides by regular commercial practice, at least where the refusal to supply is disproportionate and operates to the detriment of consumers;
- such an abuse may occur where the potential result of the refusal to supply is to eliminate a competitor in a downstream market where the dominant undertaking is itself in competition with the undertaking potentially eliminated, at least if the goods or services in question are indispensable for the activities of the latter undertaking and there is a potential adverse effect on consumers; and
- it is not an abuse to refuse access to facilities that have been developed for the exclusive use of the undertaking that has developed them, at least in the absence of strong evidence that the facilities are indispensable to the service provided, and there is no realistic possibility of creating a potential alternative.

The refusal to supply can be express or "constructive". For example, in Intecare Direct Ltd v Pfizer Ltd [2010] EWHC 600 (Ch) Roth J found that the refusal would be a "constructive" one; "if a dominant undertaking offers to supply only on terms, whether as to price or otherwise, that renders the purchase commercially unviable, that would be a constructive refusal".

37 Do these abuses require an essential facility?

One of the conditions of the refusal to supply or refusal to license test is the requirement that the input is indispensable. The word "indispensable" is used interchangeably with "essential facility", particularly in access to infrastructure cases (such as networks and pipelines). However, the term "essential facility" is not always used in refusal to supply or license cases. For example, in Intecare Direct Ltd v Pfizer Ltd [2010] EWHC 600 (Ch), concerning the refusal to supply a prescription drug, there was no reference to an "essential facility". The key issue was satisfying the "indispensability" requirement.

38 What is the test for an essential facility?

The Abuse Guideline states that an assessment of whether a particular facility is essential is made on a case-by-case basis. A facility will only be viewed as essential where it can be demonstrated that access to it is indispensable to compete in a related market and where duplication is impossible or extremely difficult owing to physical, geographic or legal constraints (or is highly undesirable for reasons of public policy).

39 What is the test for exclusivity arrangements?

According to the CMA's Guideline "Vertical agreements" (OFT 419, December 2004), the CMA will conduct an effects-based assessment of a vertical restraint, to determine whether it restricts competition. Where an undertaking has market power, it notes that "the restraint may have anti-competitive effects if its (likely) effect is to foreclose (a substantial part of) a market to competition or dampen competition".

Exclusive arrangements with a dominant undertaking are more likely to be problematic where parties have to contract with the dominant undertaking (eg, it sells an essential item) or the arrangements are of a long duration.

The UK authorities have intervened in a number of instances. In National Grid, the OFT found that National Grid had infringed the Chapter II prohibition by entering into long-term contracts which contained restrictions on the ability of gas suppliers to switch to competing meter operators. The finding was upheld by the CAT and Court of Appeal, although the fine was reduced (National Grid v Gas and Electricity Markets Authority [2010] EWCA Civ 114). The CMA has closed several investigations into exclusive purchasing obligations by accepting commitments, including not to require exclusive purchasing arrangements (Bacardi OFT 30 January 2003), reducing contract terms from five to two years (Calor Gas Northern Ireland OFT 8 July 2003), adopting flexible arrangements in place of five-year exclusive purchasing contracts (Certas Energy CMA 24 June 2014), and not to require exclusive purchasing or 'no less favourable terms' conditions (which the CMA considered replicated the incentives and effects of exclusivity) (ATG Media CMA 29 June 2017). Ofgem accepted commitments from a power exchange to address concerns that it had failed to take steps to allow other nominated electricity market operators (NEMOs) to access cross-border intraday auctions, preventing them from entering the market for the provision of cross-border intraday electricity trading platform and related services (EPEX Spot SE and EEX Ofgem 18 June 2019).

A claimant was also successful in a standalone private damages claim against Network Rail, on the grounds that by mandating the exclusive use of a single supplier assurance scheme for access to its rail infrastructure, Network Rail foreclosed in-market competition for supplier assurance schemes and abused a dominant position (see question 61).

While most cases have concerned exclusive purchasing, the High Court upheld a finding of abuse where a dominant firm had limited its ability to supply competitors of its downstream customer for seven years (Arriva the Shires v London Luton Airport [2014] EWHC 64 (Ch)).

40 What is the test for predatory pricing?

The UK authorities have considered predatory pricing consistently with EU case law, and particularly AKZO Chemie v Commission [1991] ECR I-3359, and found that a dominant undertaking may abuse its dominant position by charging prices below costs.

The following points can be drawn from UK cases (in particular the CAT cases of Napp Pharmaceutical v Director General of Fair Trading [2002] CAT 1 and Aberdeen Journals v OFT [2003] CAT 11):

- the UK authorities have generally considered pricing by reference to average variable costs (AVC);
- even where pricing is below AVC, it may exceptionally be open to a dominant undertaking to rebut the presumption of abuse (Aberdeen Journals). This would be particularly difficult where the pricing policy was a response to market entry or directed towards eliminating a competitor;
- the test for abuse does not include a requirement to show that the dominant undertaking can recoup its losses, although it is a factor to consider;
- the timing over which the costs are considered is key because the longer the period taken, the more likely it is that costs will be considered variable under the AKZO test and that pricing below them may give rise to a presumption of abuse. However, the CAT noted that whether the period taken was reasonable was a question of fact and degree, to be judged in the circumstances of the case.

It is an open question whether short-run below cost pricing is abusive. The OFT argued before the CAT that short run promotions for a limited period was a common practice when introducing a new product and a legitimate commercial reason for the purposes of building up a customer base. The CAT did not rule on this point but noted that EU case law "points in a different direction" (Terry Brannigan v OFT [2007] CAT 23). The OFT applied a similar analysis in Flybe where it found that an airline incurring losses on entering a new route was normal commercial practice and evidence of an objective justification (OFT 26 November 2010).

41 What is the test for a margin squeeze?

The Court of Appeal considered the test for a margin (or price) squeeze in Albion Water [2008] EWCA Civ 536. It considered EU case law and noted that the precise way the test was formulated was tailored to the context of the case. However, it noted the following common features:

- the existence of an upstream and downstream market;
- the presence of a vertically integrated undertaking dominant on the upstream market and active (whether or not also dominant) in the downstream market;
- the need for access to an input from the upstream market to operate on the downstream market;
- the setting of upstream and downstream prices, which leaves insufficient margin for an efficient competitor to operate profitably in the downstream market. The Court of Appeal clarified that this should be determined by reference to the "equally efficient competitor" test (rather than reasonably efficient), in line with EU caw law, and which focuses on the costs of the dominant undertaking's own downstream operation; and
- the absence of an objective justification for the margin squeeze.

Allegations of margin squeeze have been rejected in a number of instances before sectoral regulators, in particular Ofcom, in the majority of cases on the grounds that there was insufficient evidence of anticompetitive effect. Ofcom made such a finding even in an instance where the dominant undertaking's margin had been negative for 10 months, which Ofcom noted was largely driven by one contract (BT's Wholesale Calls Pricing Ofcom 20 June 2013).

42 What is the test for exclusionary discounts?

The UK competition authorities and courts will have regard to EU case law regarding exclusionary discounts.

Aside from two cases where this abuse, among others, was established (Napp Pharmaceuticals (OFT 30 March 2001) and EWS (ORR 17 November 2006)), in several instances investigations into exclusionary rebates were closed on the grounds of a lack of material consumer detriment (as well as administrative priority).

In August 2017, the CMA closed an investigation into Unilever's rebates on ice creams (in the form of promotional schemes with free or discounted additional products) and issued guidance on its approach (CMA 9 August 2017). The CMA considered that the structure and availability of the rebates taken together with retailers' purchasing patterns meant that the rebates were unlikely to have had an exclusionary effect. The offers applied indiscriminately to contestable and non-contestable products and were available for short periods, during the winter months, whereas retailers purchased on a weekly or even daily basis, and sales were significant during the summer.

In March 2019, the CMA closed an investigation into Merck Sharp & Dohme (MSD)'s discount scheme for MSD's branded infliximab product, Remicade (CMA Case 50236 14 March 2019). The CMA found that the discount scheme was designed to have an exclusionary effect, by inducing the National Health Service (NHS) to remain loyal to Remicade and making it harder for suppliers of biosimilars to enter the market and compete (against MSD's discounted rate). NHS specialists also understood the scheme as designed, ie, to make it harder for them to switch. However, the CMA concluded that the scheme was not in fact likely to restrict competition given the particular factual circumstances in the market at the time. It found that MSD had overestimated both the degree of clinical caution towards biosimilars and the strength of the financial incentive to remain loyal. Accordingly, it concluded there were no grounds for action.

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

The CMA lists exploitative abuses as a category of abuse in its Abuse Guideline.

Excessive pricing has been established in several instances and the CMA is currently focusing in particular on the pharmaceutical sector. The CMA issued an infringement decision against Pfizer and Flynn in December 2016 (CMA 7 December 2016; see further details below) and is currently conducting three further investigations into possible excessive and unfair pricing, in relation to Hydrocortisone tablets, Fludrocortisone Acetate tablets, and hand sanitiser products (prompted by the covid-19 pandemic).

The test for excessive prices, mainly set out in the EU case of United Brands EU:C:1978:22 (see EU chapter), was considered by the Court of Appeal in Attheraces v British Horseracing Board [2007] EWCA Civ 38, the CAT in Albion Water [2008] CAT 31, and clarified more recently by the Court of Appeal in Pfizer/Flynn [2020] EWCA Civ 339, an important case that warranted an intervention from the European Commission. The Court of Appeal reviewed previous case law (including United Brands) and made the following findings:

- The basic test for abuse, as set out in article 102 TFEU and the Chapter II prohibition, is whether the price is "unfair". This is broadly the case where the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of "normal and sufficiently effective competition".
- An example of an unfair price is one that is "excessive" because it bears no "reasonable" relation to the economic value of the good or service.
- There is no single method of establishing abuse and competition authorities have considerable flexibility in the choice of methodology to use and which evidence to rely upon.
- Importantly, and one of the main takeaways from the judgment, it is not necessary to follow the United Brands test rigidly. The alternative wording in the United Brands test (whether the price is unfair 'in itself' or by reference to 'competing products') does not entitle the competition authority to ignore evidence adduced by the defendant relating to the other limb. While there is no obligation on the authority to consider evidence of other methods or use more than one method, where an undertaking relies in its defence on other methods or types of evidence, the authority must fairly evaluate the evidence. The Court of Appeal has, therefore, shifted the emphasis of the United Brands test from a literal interpretation to a test based on assessing the economic evidence adduced.
- The Court of Appeal considered the cost-plus approach acceptable (and suggested it was well-suited to this case). It clarified that there is no requirement for the authority to consider the price against a benchmark price in a competitive situation. The choice of benchmark is for the authority and can be based on the undertaking's costs, comparators or any other benchmark or combination capable of showing 'sufficient' indication of an excessive and unfair price.

- The Court of Appeal disagreed with an important aspect of the CAT's judgment: the test does not require a free-standing assessment of 'economic value' in addition to assessing excessiveness and unfairness. Economic value can be measured and evaluated in various parts of the test (eg, in the 'plus' or 'fairness').

In Albion Water, the CAT upheld a finding of abuse. In Pfizer/Flynn, while the Court of Appeal largely upheld the CAT's decision to overturn the CMA's finding of an abuse, it disagreed with important aspects of it. The case has been remitted back to the CMA with additional clarifications from the Court of Appeal (see question 61).

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

Section 18(1)(c) of the Act lists as an example of an abuse applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

A form of non-price abusive discrimination was considered by the High Court in Purple Parking [2011] EWHC 987 (Ch). The High Court considered in turn the requirements for equivalence of transactions, dissimilar conditions, competitive advantage and whether there was an objective justification. The court considered Heathrow had discriminated against Purple Parking both by imposing a charge on Purple Parking and requiring it to operate from a different area. It held it had infringed the Chapter II prohibition.

The UK authorities have also found abuses in the form of price discrimination. In Napp, the OFT found that Napp had, among other things, abused its dominant position by providing higher discounts in relation to customers and types of drugs where it faced competition (Napp Pharmaceuticals OFT 30 March 2001). In EWS the ORR found EWS had abused its dominant position by (among other things) charging selectively higher prices to a customer (who was also a competitor) in the coal haulage market, without objective justification (English Welsh & Scottish Railway ORR 17 November 2006). Ofgem accepted commitments from SSE to address its concerns that in the market for electricity connections SSE was favouring its own connections business to the detriment of competitors by applying additional or higher costs or quoting differently (Ofgem 7 November 2016). In August 2018, Ofcom fined the incumbent postal operator Royal Mail for price discriminating against its only major competitor, a decision which has been upheld on appeal (see question 61).

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

Outside of sector-specific regulatory requirements (eg, in telecommunications, water and other utilities), as a general rule an undertaking must have a degree of market power to be subject to unilateral conduct rules. This holds true even in respect of the CMA's proposals for reform regarding online platforms, which generally presuppose a degree of market power (see further question 64).

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

No. The Abuse Guideline explicitly states that it is not necessary to show that the abuse is committed in the market in which the undertaking is dominant for conduct to be abusive. However, where the effects of the conduct are felt on a market that is not dominated, a de minimis threshold applies and the effects of the abuse must be appreciable (Streetmap v Google).

Sanctions and remedies

47 What sanctions can the competition authority impose or recommend?

The UK competition authorities have the power to:

- impose fines if the infringement committed was either intentional or negligent. However, "conduct of minor significance" cannot be the subject of a financial penalty. Conduct is considered to be of minor significance if the turnover of the undertaking concerned does not exceed £50 million. This does not apply to infringements of article 102 TFEU;

- give such directions as considered appropriate to bring the infringement to an end (see question 51); and
- apply for an order to disqualify directors for up to 15 years.

They may also accept binding commitments and reach settlements (see question 54).

48 How are fines calculated for abuses of monopoly power?

When fixing the level of financial penalties, the CMA will usually follow a six-step approach set out in its "Guidance as to the appropriate amount of a penalty" (CMA 73, April 2018):

- calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking (this can be a percentage of up to 30 per cent of the 'relevant turnover' attributable to the relevant product and geographic market affected by the infringement. However, the CMA will generally use a starting point of between 21 and 30 per cent for most serious infringements, such as cartels, excessive pricing or predatory pricing, and between 10 and 20 per cent for less serious object or effects, infringements);

The starting point will then be adjusted based on:

- the duration of the infringement;
- any aggravating or mitigating circumstances;
- the need for specific deterrence and proportionality;
- ensuring the upper limit of 10 per cent of group worldwide turnover is not exceeded and the need to avoid double jeopardy (e.g., if fines have already been imposed by the European Commission); and
- any discounts to reward early settlement and/or leniency, and in exceptional circumstances for financial hardship.

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

The highest fine imposed on an individual undertaking for an infringement of the Chapter II prohibition was £84.2 million imposed on Pfizer by the CMA in December 2016 (see question 43).

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

In the past five years UK authorities have imposed fines for an infringement of the Chapter II prohibition in three instances:

- £50 million on Royal Mail in August 2018 (Ofcom 14 August 2018);
- £84.2 million on Pfizer and £5.2 million on Flynn in December 2016 (CMA 7 December 2016); and
- £37.6 million on GSK (which also included an infringement of the Chapter I prohibition and article 101 TFEU) (CMA 12 February 2016).

51 Can the competition authority impose behavioural remedies?

The UK competition authorities have the power to impose such directions as they consider appropriate to bring the infringement to an end, including behavioural. These include directions requiring the undertaking to modify or cease the conduct in question.

Once an investigation has started, they may also impose interim measures if this is necessary as a matter of urgency to prevent significant damage to a person or category of persons or to protect the public interest.

52 Can it impose both negative and positive behavioural obligations?

Yes. Directions may impose positive actions and reporting obligations, for example providing information to the CMA to monitor compliance.

53 Can the competition authority impose structural remedies?

The Act does not specifically provide for the possibility of imposing structural remedies. However, the CMA considers that it has this power. Its Guideline "Enforcement" (OFT 407, December 2004) provides that "the

directions appropriate to bring an infringement to an end may be (or may include) directions requiring an undertaking to make structural changes to its business".

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

Yes. Undertakings under investigation can approach the authority to offer commitments at any time prior to the issuance of a formal decision. The UK competition authorities have full discretion as to whether or not to accept them. Prior to accepting them, they will conduct a public consultation before reaching a final decision. This decision will end the investigation, without either the undertaking accepting, or the authority finding, there has been an infringement.

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

Between January 2014 and June 2020, the UK competition authorities opened investigations into approximately 18 Chapter II prohibition cases. Out of these, to date two have resulted in fines and none have been settled.

56 Have there been any successful actions by private claimants?

A number of cases have been brought before the UK courts for breach of the Chapter II prohibition and succeeded. Examples include Purple Parking (see question 44), Arriva the Shires v London Luton Airport (see question 39), Socrates (see question 10) and Network Rail (see question 61).

Appeals

57 Can a company appeal a finding of abuse?

Yes. A party found by the CMA (or a sectoral regulator) to have breached the Chapter II prohibition may appeal that decision to the CAT.

58 Which fora have jurisdiction to hear challenges?

An appeal of a Chapter II prohibition finding can be heard before the CAT.

Appeals from the CAT are heard by the Court of Appeal (or the Inner House of the Court of Session in Scotland where the CAT has determined that it is acting as a tribunal sitting in Scotland).

59 What are the grounds for challenge?

Appeals to the CAT may be made on a point of law or on the merits. The appellant is allowed to raise any ground of challenge to the decision, including evidence and arguments not raised during the procedure (save that it may not advance a whole new case).

An appeal to the Court of Appeal may only be made on a point of law or on the amount of the penalty imposed. Leave to appeal must be obtained from the CAT.

60 How likely are appeals to succeed?

The CAT has not been shy to overturn decisions of UK competition authorities. However, it is not possible to draw a rule of thumb as to the likely success of appeals.

The Court of Appeal has acknowledged that the CAT is a highly specialised tribunal and that it would hesitate to interfere with the CAT's assessment. It will, however, intervene where the CAT errs on points of law.

Topical issues

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

In July 2019, the CAT upheld a private damages claim brought by Achilles, a provider of supplier assurance services, against Network Rail, the operator of national rail infrastructure in Great Britain. The CAT found that Network rail had abused its dominant position in the market for the operation and provision of access to national rail infrastructure by mandating the use of a single supplier assurance scheme (RISQS) by other buyers who require access to its infrastructure. This meant that individuals, contractors or train operating companies needing access to Network Rail's infrastructure could only do so if accredited by RISQS, irrespective of whether they were contracting with Network Rail or not, and Network Rail did not recognise supplier assurance schemes provided by any other undertaking. The CAT found that by reserving a significant segment of the market for supplier assurance to the rail industry to a single scheme provider, Network Rail caused significant foreclosure of demand in that segment (which met the Streetmap test of an appreciable effect in the related (non-dominated) market). The CAT rejected a tendering process as a defence to the abuse on the grounds that factually the periodic opening up of competition did not outweigh the restriction of continuing and dynamic in-market competition. The tender was limited to two component services, and risked 'locking in a sub-optimal outcome' and weakening competition in the market in the interim. It rejected as irrelevant the argument that Network Rail stood to gain no commercial benefit from the rule. The objective justification arguments were dismissed on the basis that the restriction was not indispensable to the achievement of the health and safety purpose. The judgment was upheld on appeal by the Court of Appeal.

One of the most interesting features of the case is the rejection of the tender exercise as a means of outweighing a restriction of in-market competition, based on an assessment of the facts of the case, including the design of the tender exercise and extent of competition in the tender.

In August 2018, Ofcom imposed a fine of £50 million on the incumbent postal operator, Royal Mail, for price discriminating against its only major competitor for the delivery of letters (Ofcom Case CW/01122/01/14 14 August 2018). Ofcom found that Royal Mail unilaterally introduced price increases for must-have access services which would have a material impact on the profitability of an end-to-end entrant and make market entry or expansion significantly more difficult. Based on its review of internal documents, Ofcom considered that the price changes were part of a deliberate strategy targeted at the competitor in response to plans that would pose a serious challenge to Royal Mail's effective monopoly. Ofcom did not consider that the suspension of the price changes after six weeks (following the launch of Ofcom's investigation) was enough to prevent a distortion of competition or continuing effects (they were eventually fully withdrawn 14 months later); Ofcom found the changes materially contributed to the competitor's decision to reduce and then suspend its market entry plans. Ofcom rejected arguments that the changes were necessary to secure provision of the universal service: it considered the changes were driven by concerns with preserving market share, rather than creating efficiencies.

The decision was appealed but upheld in full by the CAT. Two appeal grounds are of particular note. First, the CAT rejected the argument that there could be no abuse where the price differential was never applied (because the notified pricing scheme was suspended following the launch of Ofcom's investigation and never brought into effect). The CAT found Ofcom had followed the correct two-part approach of determining (i) whether the notified prices would have been discriminatory under article 102; and (ii) if so, whether the mere notification of the new pricing scheme was itself a sufficient basis for the finding of abuse. This would be the case where it was not competition on the merits, was likely to hinder the maintenance or growth of competition and lacked objective justification. Second, the CAT rejected the argument that Ofcom should have applied the as-efficient competitor (AEC) test. Assessing Intel and Post Danmark II, the CAT found there is no requirement to establish anticompetitive foreclosure by means of the AEC test in all pricing cases and there is no defined 'class' of cases where the AEC test must be used. The choice of analytical m, in its view, detracts from the basic legal responsibility of dominant undertakings. The CAT found Ofcom had correctly found the effect of the conduct was sufficiently material to be abusive and foreclosure had correctly been assessed 'in the round'.

In December 2016, the CMA imposed a record fine on pharmaceutical manufacturer Pfizer, and the maximum possible fine on distributor Flynn, for charging excessive and unfair prices for drugs used for the treatment of epilepsy. The CMA had found that prices were increased by up to 2,200 per cent overnight, had no reasonable relation to the economic value of the capsules (with levels of excess between 29 per cent and 705 per cent) and therefore were unfair in themselves and abusive (CMA Case CE/9742-13 7 December 2016). In June 2018, the CAT overturned the CMA's finding of abuse, and (partly) remitted the case back to the CMA. The

judgment was appealed to the Court of Appeal, which upheld the bulk of the CAT's decision while disagreeing with important aspects of it (in particular, with the CAT's criticism of the CMA's decision to restrict itself solely to a cost-plus approach and the CAT's requirement for a standalone assessment of 'economic value'). The Court of Appeal has recalibrated the United Brands test in an important decision with implications both in the UK and the rest of the EU (see question 43).

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

Excessive pricing has been a topical theme in recent years, both across the EU and in the UK, particularly with the decisions in Pfizer/Flynn. While excessive pricing has long been recognised as a form of abuse, there has historically been limited enforcement, owing in large part to competition authorities' reluctance to become price regulators. This changed over the course of the past three to four years with several cases initiated in the pharma sector by the CMA. The case law emerging from Pfizer/Flynn, particularly the Court of Appeal's judgment in March 2020, has clarified the test applicable to such cases and largely condoned the CMA's approach, which may embolden the CMA to consider further cases. It currently has two ongoing investigations in the pharma sector (in addition to Pfizer/Flynn, which has been remitted back to it). In the context of the pandemic, it has recently launched a new investigation into excessive pricing of hand sanitiser products, and issued a warning shot to pharmacies stating it is prepared to consider enforcement if it finds evidence of excessive pricing.

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

The CMA has opened a number of cases in the pharmaceutical or medical devices sector. By way of illustration, of the 43 cases opened under the Act since April 2014, 13 are in the life sciences sector. Out of these nine are abuse cases. Note this counting ignores the fact that the CMA has brought several related cases into one (eg, for Hydrocortisone tablets since February 2020). Digital markets are also an area of priority for the CMA, which has proposed sweeping reforms to address concerns in the sector (see question 64).

64 What future developments can we expect?

The UK has been an active participant in the global debate on competition law reform. In 2019, the review led by former Chief Economist to President Obama, Professor Jason Furman, made a series of strategic recommendations to the UK government to update the rules on antitrust enforcement and merger control, and proposed a set of pro-competitive reforms. These were accepted in March 2020 by the UK government, which appointed the CMA to lead a Digital Markets Taskforce to advise the government on how to take the proposals forward. The conclusions of the CMA's market study into Online Platforms and Digital Advertising, published in July 2020, are an important foundation for work that the CMA will continue in its guise as the head of the Digital Markets Taskforce. The CMA concluded that its existing tools were not sufficient and too slow to address competition issues in the sector, which it considered require ongoing monitoring and flexible interventions. The CMA recommends ex ante measures in the form of a new pro-competition regulatory regime declining in two categories of interventions: an enforceable code of conduct for companies with 'strategic market status' and pro-competitive interventions aimed at tackling the sources of market power, including important powers to mandate data access and interoperability, and to order separation of platforms where necessary. These findings are consistent with reviews in other jurisdictions (eg, the EU).

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Prior to joining CMS, Jackie was a stagiaire at the European Court of Justice and the European Commission, where she worked on competition and IP issues associated with the 'Open Innovation' model resulting in a report published by the European Commission. She is a member of the Law Society's Competition Section and is a frequent author in various legal publications.

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