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COMPETITION

Restraints of trade and dominance in the UK (England and Wales): overview

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RESTRAINTS OF TRADE

Scope of rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

Restrictive agreements and practices are regulated by the Chapter I prohibition in the Competition Act 1998 (Chapter I), the UK equivalent of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Chapter I prohibits agreements, decisions by associations or concerted practices that restrict competition within the UK, in particular agreements that:

- Fix prices.
- Limit or control production, markets, technical development or investment.
- Share markets or sources of supply.
- Unfairly discriminate.
- Make contracts conditional on unconnected additional obligations.

It is also a criminal offence for individuals to engage in hard-core cartel activity (*Enterprise Act 2002*).

Regulatory authority

The Competition and Markets Authority (CMA) took over the competition (and some consumer) functions of the Office of Fair Trading (OFT) and the Competition Commission (CC) on 1 April 2014. The OFT and the CC were abolished at the same time.

The CMA is principally responsible for enforcing Chapter I/Article 101 (*see above, Regulatory framework*). Certain sector regulators have concurrent powers with the CMA (the following discussion refers only to the CMA, but is generally equally applicable to the application of the competition rules by the sectoral regulator). In addition, private litigants can go to court seeking damages and/or injunctive relief for breaches on a follow on or standalone basis.

The CMA (together with the Serious Fraud Office) is also responsible for criminal prosecutions of the cartel offence (*see Question 13*). Companies involved in cartel activity may additionally face investigation by the Serious Fraud Office for conspiracy to defraud.

See box, *The regulatory authorities*.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

Chapter I (Competition Act), like Article 101 of the Treaty on the Functioning of the European Union (TFEU), applies equally to formal and informal agreements, whether legally binding or not, and whether written, oral or tacit.

Exemptions

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

An agreement that is not excluded (*see Question 4*) can benefit from an exemption where all of the following criteria are met (*section 9, Competition Act*):

- It contributes to technical or economic progress, or improves production or distribution.
- Consumers enjoy a fair share of the resulting benefit.
- The restrictive elements are indispensable to the aim pursued.
- It does not give the parties the opportunity to substantially eliminate competition.

Additionally, an agreement will benefit from parallel exemption from the Chapter I (Competition Act) prohibition if it falls within the scope of one of the EU block exemptions. The Secretary of State may also make UK block exemptions for certain categories of agreements. The only block exemption currently made under the Competition Act 1998 relates to public transport ticketing schemes.

In addition to the above, Schedule 3 to the Competition Act exempts various categories of agreement from the domestic competition rules (for example, those relating to coal and steel products, and to agricultural products).

Exclusions and statutes of limitation

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

Certain agreements are automatically excluded from Chapter I (Competition Act), including transactions subject to EU or UK merger control, and agreements that are subject to competition scrutiny under the Broadcasting Act 1990 or Communications Act 2003. Land agreements (that is, contracts and other commercial arrangements in the property sector) were previously excluded but have been subject to Chapter I since April 2011.

Agreements with *de minimis* (non-appreciable) effects are not subject to Chapter I. There is no legislative definition of this but the Competition and Markets Authority (CMA) takes into account the European Commission's approach as set out in the Notice on Agreements of Minor Importance. Separately, "small agreements" between undertakings whose combined group turnover does not exceed GB£20 million have limited immunity from fines. However, they may still face CMA investigation or civil action by third parties.

Statutes of limitation

There is formally no limitation period for CMA action under the Competition Act.

The Consumer Rights Act 2015 extended the limitation period for claims to be brought before the Competition Appeal Tribunal (CAT) from two years following the expiry of the deadline to appeal the underlying competition infringement decision to six years from the date of the cause of action, in line with High Court proceedings. However, if the cause of action arose before 1 October 2015, the old CAT limitation rules continue to apply and the period remains two years. There are specific rules relating to collective actions.

Notification

5. What are the notification requirements for restrictive agreements and practices?

Notification

There is no mechanism for notification to the Competition and Markets Authority (CMA). Undertakings must self-assess whether their agreements are subject to Chapter I (Competition Act) or Article 101 of the Treaty on the Functioning of the European Union (TFEU) and, if so, whether they qualify for an exemption or exclusion (*see Questions 3 and 4*).

The CMA is trialling a Short-form Opinion (SfO) procedure through which it provides guidance to parties on specific questions in order to facilitate their self-assessment. However, this procedure is only available for:

- A limited number of cases each year.
- Specific questions about a vertical or horizontal agreement that gives rise to "novel or unresolved questions, the clarification of which would benefit a wider audience" (*para 1.2, Guidance on the CMA's approach to Short-form Opinions*).

Informal guidance/opinion

The CMA can offer confidential and non-binding informal advice on an ad hoc basis. The CMA may publish written guidance in exceptional cases that raise new or unresolved questions requiring clarification.

The CMA can also issue guidance under the SfO procedure; however, this is only available in very limited circumstances (*see above, Notification*).

Responsibility for notification

There is no formal notification process. All parties to the agreement must self-assess whether their agreement is compliant with competition law and act accordingly.

The parties to an agreement may however request an SfO from the CMA in very limited circumstances (*see above, Notification*).

Relevant authority

There is no formal notification process. Requests for the issue of an SfO must be made to the CMA; however this is only available in very limited circumstances (*see above, Notification*).

Form of notification

There is no formal process of notification. Parties seeking clarification from the CMA through an SfO should approach the CMA informally to agree the best way to proceed, by contacting *sfo@cma.gsi.gov.uk*.

When contacting the CMA regarding an SfO, parties should provide sufficient information, including

- The parties to, and the markets affected by, the proposed agreement.
- The background to and commercial rationale for the proposed agreement.
- A description of the likely effect of the proposed agreement on competition within the relevant market(s).
- An assessment of how the proposed agreement meets each of the CMA's criteria for the issue of an SfO.
- A preliminary outline of the novel or unresolved questions that the CMA is asked to address in the SfO.

Filing fee

There is currently no filing fee for submitting an SfO request to the CMA.

Investigations

6. Who can start an investigation into a restrictive agreement or practice?

Regulators

The following prompts may trigger investigation by the Competition and Markets Authority (CMA):

- The CMA's own research and market intelligence.
- Evidence gathered through other CMA work streams, such as the CMA's merger or markets functions.
- Use of the CMA's powers under the Regulation of Investigatory Powers Act 2000.
- Information received via the European Competition Network or the European Commission (*see Question 27*).

Third parties

Third parties (such as customers or competitors) can prompt an investigation by either lodging a complaint or starting standalone civil proceedings in the courts. In some cases, complainants can approach the CMA informally in the first instance. The CMA decides which cases to investigate based on published prioritisation principles.

The method of complaint depends on the type of anti-competitive activity being alleged. To report a cartel, the CMA has set up a "cartel hotline" and can informally be contacted by phone or e-mail. All other types of abuse should be reported using the dedicated notification form, available from the CMA's website. The CMA does not normally respond to individual complaints, but may open an investigation or contact the company in question. Whether the CMA will ultimately open an investigation is decided according to its published "prioritisation principles" by reference to the impact on consumers and the potential strategic significance of the work. The published principles contain a detailed, but not exhaustive, list of points of consideration for the CMA when deciding whether to open an investigation following a complaint by a third party.

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

The Competition and Markets Authority (CMA) grants formal complainant status to any person who:

- Submits a written, reasoned complaint to the CMA.
- Is (or is likely to be) materially affected by the agreement or practice concerned.
- Requests formal complainant status.

Formal complainants may become involved at key stages of the CMA investigation, although they have little influence over its course or timing.

Document access

The CMA will consider providing the formal complainants with access to the same information as is available to companies under investigation at the outset of its formal investigation. This will depend on the circumstances of the individual case. Where the CMA provides such information, the formal complainant is legally obliged to respect its confidentiality.

Be heard

If the CMA does not issue a statement of objections setting out a provisional finding of infringement (*see Question 8*), the formal complainant can only comment on the CMA's provisional findings before a definitive decision is made to close the file. If the CMA issues a Statement of Objections, the formal complainant is consulted and given an opportunity to comment either in writing or at an oral hearing. Third parties (including formal complainants) are not normally invited to attend the parties' oral hearings.

8. What are the stages of the investigation and timetable?

The Competition and Markets Authority (CMA) obtains information about possible competition law breaches through a number of sources, including complaints and leniency applications.

The CMA decides which cases to investigate on the basis of its published prioritisation principles. Prioritised cases are allocated to one of the CMA's groups within the Enforcement Directorate for initial assessment. The CMA typically gathers information informally at this stage.

The decision to open a formal investigation depends on whether the legal test that allows the CMA to use its formal investigation powers has been satisfied, and the case continues to fall within the CMA's casework priorities. When the CMA opens a formal investigation, the case is allocated a Team Leader, a Project Director and a Senior Responsible Officer (SRO). The CMA also publishes a "notice of investigation" setting out basic details of the case and a case-specific administrative timetable for the investigation (but normally not the identity of the parties under investigation).

After a formal investigation is opened, the CMA can use formal powers to obtain information (*see Question 10*). The time taken to establish the facts and whether they point to an infringement of competition law varies from case to case. The CMA generally provides case updates to businesses under investigation and formal complainants either by telephone or in writing. The CMA also offers each party under investigation separate "state of play" meetings to meet with representatives of the case team (including the SRO and/or Project Director) to ensure that they are aware of the stage the investigation has reached.

CMA investigations can be resolved in a number of ways. The CMA:

- Can decide to close an investigation on grounds of administrative priorities.
- Can issue a decision that there are no grounds for action, if the CMA has not found sufficient evidence of an infringement of competition law.
- Can accept commitments from a business relating to its future conduct where the CMA is satisfied that these commitments fully address the competition concerns.
- Issues a Statement of Objections where the CMA's provisional view is that the conduct under investigation amounts to an infringement of competition law.

The parties then have the opportunity to examine the (disclosable) evidence on the CMA's file, to attend an oral hearing and make a written submission in response to the Statement of Objections. Once a Statement of Objections has been issued, a three-member Case Decision Group is appointed by the Case and Policy Committee to be the final decision-maker in the case. The SRO, who was responsible for authorising the opening of the formal investigation and issuing of a Statement of Objections, will not be a member of the Case Decision Group.

The CMA issues an infringement decision if there is sufficient evidence. If it does not find sufficient evidence it may publish a reasoned decision explaining why there are no grounds for further action.

There is no set timetable for conducting an investigation.

Publicity and confidentiality

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The Competition and Markets Authority (CMA) generally publishes a "notice of investigation" when it opens a formal investigation (*see Question 8*). The CMA also announces the issuance of a Statement of Objections or securing of commitments, and publishes any final infringement decision.

Automatic confidentiality

The CMA has a basic duty to keep information relating to any business or individual confidential, subject to certain exceptions. If the CMA is proposing disclosure, it must both inform the person supplying the information of its proposed action and give that person a reasonable opportunity to make representations that the information should not be disclosed.

Before disclosing information, the CMA must consider:

- The extent to which disclosure is necessary.
- Whether disclosure is contrary to the public interest.
- The need to exclude from disclosure:
  - commercial information that may significantly harm the legitimate business interests of an undertaking; and
  - information relating to the private affairs of an individual that may significantly harm the individual's interests.

In some cases, the CMA may consider the use of confidentiality rings or data rooms to allow limited disclosure to a defined group of persons.

Confidentiality on request

It is open to a party to request that certain information is kept confidential. The CMA will not accept unsubstantiated confidentiality claims. In dealing with requests, the CMA applies the same rules described above (*see above, Automatic confidentiality*). These general rules do not apply to the Competition Appeal Tribunal (CAT) if there is an eventual infringement decision that is appealed.

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

Once the Competition and Markets Authority (CMA) opens a formal investigation it has the four main powers to (*Competition Act*):

- Require the disclosure of documents and information (section 26 notices).
- Require individuals connected with an undertaking under investigation (which the CMA guidance states could include directors, current and former employees, consultants, contract staff, volunteers and professional advisers) to answer questions. Individuals do not have the right to refuse to answer questions unless doing so would be self-incriminatory or result in disclosing legally privileged information.
- Enter business premises without a warrant and require production of documents relevant to the investigation (section 27 inspection).
- Enter premises without notice with a warrant in order to search for documents relevant to the investigation (dawn raid). The CMA also has the power to conduct these raids on domestic premises.

The CMA can impose significant financial penalties, either a fixed amount of up to GB£30,000, an amount calculated by reference to a daily rate of up to GB£15,000 or a combination of both where these are subject to the current statutory maximum, on parties who do not comply with an investigation. A person found obstructing the exercise of powers under section 27 is liable to a fine only. For other forms of non-compliance with an investigation, a person may be liable to imprisonment for a term not exceeding two years or to a fine, or both.

Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

The Enterprise and Regulatory Reform Act 2013 (ERRA) introduced new provisions for settling cases that build on the Office of Fair Trading's (OFT) previous enforcement practice. Settlement is a voluntary process in which the business settling must admit it has breached competition law. In return for that admission and co-operation, the Competition and Markets Authority (CMA) gives a discount off any financial penalty imposed. The pre-Statement of Objections settlement discount is capped at 20%, while the post-Statement of Objections discount is capped at 10%.

Settlement is distinct from leniency and it is possible to benefit from both discounts. The CMA's Procedural Guidance (CMA8) sets out the:

- Factors it has regard to when deciding if a case in suitable for settlement.
- Minimum requirements the settling business must satisfy.

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

The Competition and Markets Authority (CMA) can accept binding commitments as to conduct instead of issuing an infringement decision. The CMA is only likely to consider it appropriate to do so in cases where:

- The competition concerns are readily identifiable and will be fully addressed by the commitments offered.
- The proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.

The CMA is very unlikely to accept commitments in cases involving secret cartels or a serious abuse of a dominant position.

A party can (but is not required to) offer binding commitments at any time during the CMA's investigation until a decision is made. However, the closer the CMA is to reaching a decision, the less likely it is to consider it appropriate to accept commitments.

If the CMA intends to accept commitments, it notifies affected parties who have an opportunity to provide representations within a period of at least 11 working days from the date of notice. The CMA and the parties can negotiate to finalise the binding commitments. The Senior Responsible Officer (SRO) is the person responsible for accepting the commitments offered, once the Case and Policy Committee and other senior CMA officials have been consulted.

Penalties and enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The Competition and Markets Authority (CMA) can impose such directions as it considers appropriate to end the infringement. These may require the modification or termination of the infringing agreement or practice. Where the CMA considers it necessary to act urgently, either to prevent significant damage to a person or to protect the public interest, it can require a business to comply with temporary directions (interim measures) pending the outcome of the investigation. Previously, interim measures could be imposed only where the conduct would cause "serious, irreparable damage" to another business. The threshold has been lowered and the CMA can now apply interim measures where continuing the conduct would cause "significant damage".

Fines

The CMA can impose an administrative fine of up to 10% of the worldwide turnover of the offending undertaking in the year preceding the infringement for breaches of Chapters I and II (Competition Act), subject to any reduction through settlement or leniency.

Personal liability

Disqualification of directors. The CMA and certain sectoral regulators have the power to apply to the High Court for a Competition Disqualification Order (CDO) disqualifying a director from being involved in the management of a company for up to 15 years. The court must award a CDO if it is satisfied that both:

- There has been a breach of UK or EU competition law (involving a company of which the individual was a director).
- The director's behaviour in connection with that breach makes him unfit to be concerned in the management of a company.

Alternatively, the CMA may accept undertakings from a director, instead of continuing with an application for a CDO. The provision of undertakings is also likely to lead to a shorter period of disqualification than the CMA would seek in applying for a CDO.

CDOs were ordered by the Crown Court in the context of the cartel offence prosecutions in the marine hose cartel. This resulted in the disqualification in June 2008 of three directors for periods of between five and seven years (see *R v Whittle, Allison & Brammar [2008] EWCA Crim 2560* for the defendants' appeal against their sentences).

More recently, the CMA used its powers for the first time in December 2016 under the Company Directors Disqualification Act 1986 to disqualify a director for five years for infringing competition law (*Online Sales of Posters and Frames*).

Cartel offence. Individuals convicted of the cartel offence (*see Question 1*) are liable to a maximum of five years' imprisonment and/or an unlimited fine. The Enterprise and Regulatory Reform Act 2013 (ERRA) removed the original requirement for the individual to have acted dishonestly and instead made the offence subject to certain exclusions and three new defences. The prosecution must show that an exclusion does not apply, whereas it is for the defendant to show a defence does apply.

Despite a number of criminal investigations by the Office of Fair Trading (OFT), to date there have been only four prosecutions of the cartel offence:

- **Marine hose.** Following the US Department of Justice investigation into the marine hose cartel in the US, three UK businessmen involved in the cartel agreed to plead guilty to the cartel offence in order to return to the UK. In June 2008, they were sentenced to imprisonment for between 2.5 and three years each for committing the cartel offence (on appeal, the sentences were reduced by about one-third) and also disqualified from acting as company directors (*see above*).
- **Air passenger fuel surcharges.** In August 2008, the OFT announced criminal charges against four former executives of British Airways for alleged participation in a long-haul passenger fuel surcharge cartel with Virgin Atlantic. The trial began in April 2010 but collapsed when a significant volume of additional evidence was introduced by Virgin Atlantic during the trial, which neither the OFT nor the defendants' legal teams had an opportunity to review. The OFT decided it would be potentially unfair to continue with the trial.
- **Galvanised steel tanks.** One of three defendants pleaded guilty to dishonestly agreeing with others to divide customers, fix prices and rig bids in respect of the supply in the UK of galvanised steel tanks for water storage, between 2004 to 2012. His two co-defendants pleaded not guilty and were acquitted.
- **Concrete drainage products.** On 21 March 2016 the CMA announced that a man had pleaded guilty to dishonestly agreeing with others to divide supply, fix prices and divide customers between 2006 and 2013 in respect of the supply in the UK of precast concrete drainage products.

Immunity/leniency

Parties to a restrictive agreement can escape up to 100% of administrative fines, and individuals who have committed the cartel offence can escape imprisonment, by blowing the whistle on unlawful arrangements. To benefit from leniency, an applicant must meet the following conditions:

- Be the first cartel participant to inform the authorities of the arrangement.
- Accept participation in a cartel activity.
- Provide the CMA with all non-legally privileged information available to it.
- Maintain continuous and complete co-operation throughout the investigation and until the conclusion of any criminal proceedings and appeals arising as a result.
- Stop all further participation.
- Not have taken steps to coerce another undertaking to take part in the cartel activity.

Smaller reductions in administrative fines (of up to 50%) may be available if some but not all of these criteria are met.

Small agreements (that is, agreements that do not fix prices between undertakings with a combined annual turnover that does not exceed GB£20 million) that infringe Chapter I have limited immunity from fines.

Impact on agreements

Offending provisions of an agreement are void and unenforceable. If, under contract law, they are not severable from the agreement, the whole agreement is void. The CMA can also order modification or termination of an infringing agreement (*see above, Orders*).

Third party damages claims and appeals

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages

A third party that can show that it has, or is likely to, suffer loss as a result of a prohibited restrictive agreement or practice can bring a civil action for damages and other civil remedies (for example, injunctions). The action can be subsequent to or independent of any Competition and Markets Authority (CMA) investigation.

If the CMA or the European Commission makes a decision that Chapter I (Competition Act) or Article 101 of the Treaty on the Functioning of the European Union (TFEU) was infringed and this decision is no longer subject to appeal (*see Question 15*), third parties can also bring a follow-on action for damages before the Competition Appeal Tribunal (CAT) or the High Court without further need to prove an infringement.

On 1 October 2015, the Consumer Rights Act 2015 came into force, Schedule 8 of which introduced several reforms to the system for private actions for breaches of competition law, including:

- The ability to bring full standalone actions for a finding of infringement and the award of damages in the CAT, whereas it was previously possible only to bring follow-on actions.
- Bringing the time limit for bringing cases in the CAT in line with the relevant limitation/prescription period (six years for England and Wales, and Northern Ireland, and five years for Scotland), although see *Question 29* on the Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Anti-trust Damages Directive).
- Granting the CAT the same power as the High Court to grant injunctions in section 47A cases.
- Providing for a right of appeal on a point of law against a CAT decision to award damages or grant an injunction in section 47A cases or collective proceedings.
- Allowing for collective redress (*see below, Collective/class actions*).

Separately, the Anti-trust Damages Directive, which Member States had until 27 December 2016 to implement, also introduces changes to third party competition law damages regimes across the EU. Although the UK did not meet this deadline (along with

most other member states), the UK Regulations to implement the Directive came into force on 9 March 2017.

The Regulations make a number of changes to the rules governing competition litigation in the UK. Key changes include:

- Altering the starting point of the limitation period and the circumstances under which it may be suspended.
- Creating a rebuttable presumption that a cartel causes loss.
- Changing the rules on "passing on" of overcharges.

Special procedures/rules

The CAT's procedural rules have been revised to take account of the changes made by the Consumer Rights Act 2015 and the respective widening of the CAT's jurisdiction to hear standalone claims, in addition to follow-on claims. The new Competition Appeal Tribunal Rules 2015, which also entered into force on 1 October 2015, replaced the former CAT Rules 2003 and incorporated the changes above, see above, *Third party damages*). The CAT has also published a new Guide to Proceedings, which provides guidance on relevant procedural matters.

Of particular note is the new "fast-track procedure", which allows in individuals and SMEs to seek redress for anti-competitive harm in a faster and cheaper way than was previously possible.

Collective/class actions

Class actions (that is, a large group of people bringing an action collectively) were not permitted under English litigation procedural rules. English courts had historically resisted attempts to establish US-style claims where a group of claimants purports to bring an action on behalf of a larger group. The leading case in this area is *Emerald Supplies v British Airways [2009] EWHC 741 (Ch) and [2010] EWCA Civ 1284*.

One possibility was previously to have a specified consumer body bring a claim under Section 47B of the Competition Act before the CAT on behalf of two or more consumers. However, this was widely considered to be unsatisfactory. Only one action has been commenced to date by a consumer public body, and this was settled (*Consumers Association v JJB Sports*).

Under the Consumer Rights Act 2015, several possibilities are now available for consumers to seek collective redress for anti-competitive behaviour. The Act:

- Provides for opt-out and opt-in collective proceedings (previously, all proceedings were opt-in only).
- Allows the CAT to make collective settlement orders where a collective proceedings order has been made in relation to opt-out collective proceedings.
- Allows the CMA to approve voluntary redress schemes.
- Sets out that the CAT (like other courts) is bound by findings of fact by the CMA, unless it directs otherwise.

As a consequence of the changes in the Consumer Rights Act 2015, there have been two class action cases considered by the CAT, one of which is on-going. The first is a GB£14 billion action against Mastercard brought by Walter Merricks CBE, representing up to 46 million individuals. The claim follows a finding by the European Commission that Mastercard infringed EU competition law by imposing a minimum price for cross-border interchange fees, the cost of which was then passed on to consumers in the form of higher prices for goods and services. However, Mastercard has argued that the class does not have enough in common to meet the common issues test required by the CAT rules for a collective proceedings order.

The second action, fronted by pensioners' rights activist Dorothy Gibson, relates to a 2014 ruling by the Office of Fair Trading that Pride Mobility Products Ltd, the UK's largest supplier of mobility scooters, had breached competition law by preventing other retailers from advertising prices of Pride-branded scooters online below its recommended retail price. Ms Gibson was looking to bring the claim on behalf of 30,000 consumers who were allegedly overcharged for a Pride scooter between 2010 and 2012 as a result of this infringement. However, the CAT requested that the claimants reformulate their argument to focus on actual damage suffered and provide further economic evidence that Pride's interference with pricing affected the wider scooter market. As a consequence, the action was abandoned.

In addition, it is still possible to bring follow-on claims for multiple parties in the High Court:

- Part 19 of the Civil Procedure Rules (CPR) makes certain provisions for bringing, or joint management, of representative actions, which might be considered a form of class action. The attempt to establish a representative claim in the air cargo litigation in *Emerald Supplies* (see above) failed.
- Part 19 of the CPR also provides the court with the power to make a group litigation order, which allows for the collective management by the court of a number of separate cases that give rise to common or related issues of fact or law.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

The recipients of an appealable decision and any third parties with sufficient interest can apply to the Competition Appeal Tribunal (CAT) for review.

An appeal can be on points of law or fact. Making an appeal automatically suspends the obligation to pay fines but not the decision itself. However, the CAT can order suspension of a decision, pending the hearing. The CAT's powers include:

- Confirming or setting aside the decision.
- Sending the case back to the CMA or sectoral regulator for further investigation.
- Confirming or amending the amount of a financial penalty.
- Adopting interim measures.
- Giving directions, for example, bringing to an end an abuse of dominance.

Following changes through the Consumer Rights Act 2015, a CAT decision can now be appealed on points of law to the CAT. Previously, all CAT appeals on points of law were to the Court of Appeal (*see Question 14*).

There is also the possibility of bringing a claim in the High Court for judicial review.

Third party rights of appeal

A third party with sufficient interest in the proceedings has the same rights of appeal to the CAT as a party (*see above, Rights of appeal and procedure*).

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

Monopolies and abuses of market power are regulated under civil law by the Chapter II prohibition in the Competition Act 1998 (Chapter II), the UK equivalent of Article 102 of the Treaty on the Functioning of the European Union (TFEU).

Chapter II provides that any conduct on the part of one or more undertakings that amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the UK (or any part of the UK).

The Competition and Markets Authority (CMA) is principally responsible for enforcing Chapter II, in addition to Article 102. The UK's sectoral regulators have concurrent powers to investigate alleged breaches in their sector.

Regulatory authority

The CMA, the sectoral regulators or (in cases that raise defined public interest issues) the Secretary of State can make market investigation references. References can be made where there are reasonable grounds for suspecting that any feature, or combination of features, of a market in the UK for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in all or part of the UK.

Before making a market investigation reference, the CMA or sectoral regulator can conduct an initial market study or market review to see whether there is sufficient concern to merit a reference. Voluntary action addressing the concern can be accepted instead of a reference for a market investigation. A market study can lead to other outcomes, including investigations under Chapters I or II.

Market investigations do not involve a prohibition and there are no penalties. However, the CMA has wide powers to remedy any anti-competitive market features identified by its investigation, by imposing behavioural or structural undertakings on industry participants.

17. How is dominance/market power determined?

The test for dominance is the same as that under EU law. A dominant position arises if a company has a position of economic strength that enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers (*United Brands v Commission (Case C-27/76) [1978] ECR 207*).

Dominance is assessed by reference to various factors, including:

- Market structure and the competitive constraint exerted by existing competitors.
- Market share (a market share persistently above 50% is presumed dominant, but an undertaking is unlikely to be individually dominant with a share below 40%).
- Barriers to entry.
- The degree of countervailing buyer power.

18. Are there any broad categories of behaviour that may constitute abusive conduct?

Chapter II (Competition Act) provides that conduct may constitute an abuse if it consists of:

- 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.
- Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Generally, it is possible to distinguish between two main categories of abuse:

- Where the dominant undertaking uses its position to exploit its customers or suppliers.
- Exclusionary abuses designed to prevent the development of competition.

Exemptions and exclusions

19. Are there any exemptions or exclusions?

The Competition Act sets out a number of specific exclusions from the Chapter II prohibition for certain categories of conduct:

- Conduct within the merger provisions of the Enterprise Act 2002 or that would be subject to the EU Merger Regulation (Regulation (EC) 139/2004 on the control of concentrations between undertakings) (EUMR).
- Services of general economic interest.
- Conduct engaged in to comply with a legal requirement.
- Necessary to avoid conflict with international obligations.
- Necessary for compelling reasons of public policy.

There are no formal exemptions. However, certain conduct that would otherwise be an abuse may not be prohibited if there is a proportionate objective justification.

The Competition Act provides limited immunity from fines for conduct of minor significance where the undertaking's annual turnover does not exceed GB£50 million. However, this does not protect the undertaking from damages actions brought by third parties (*see Question 24*).

Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no formal notification and clearance process. However, the Competition and Markets Authority (CMA) offers ad hoc confidential informal advice on the application of the Chapter II prohibition (*see Question 5*).

Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

The procedure is the same as for restrictive agreements (*see Questions 6 to 9 and 11*). For market investigations, see *Question 16*.

22. What are the regulator's powers of investigation?

The regulator's powers are the same as for restrictive agreements and practices (*see Question 10*). However, in practice, the regulator is more likely to use its extensive powers of investigation, such as dawn raids or individual interviews, in cases of suspected abuse of dominance.

Penalties and enforcement

23. What are the penalties for abuse of market power and what orders can the regulator make?

The penalties are the same as for restrictive agreements (*see Question 13*). To the extent that an agreement infringes Chapter II (Competition Act), it is unenforceable in the courts.

Third party damages claims

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

The same rules apply as for restrictive agreements (*see Question 14*).

EU LAW

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

There are no significant differences. The Competition and Markets Authority (CMA) and the courts have an obligation to act in a manner consistent with the treatment of corresponding questions under EU law.

JOINT VENTURES

26. How are joint ventures analysed under competition law?

Joint ventures (JVs), where they are not notifiable under the EU Merger Regulation (Regulation (EC) 139/2004 on the control of concentrations between undertakings) (EUMR), are dealt with either under the UK merger control rules or under Chapter I (Competition Act)/Article 101 of the Treaty on the Functioning of the European Union (TFEU) (*see Questions 1 to 15*).

A JV is subject to UK merger control if:

- Two or more enterprises cease to be distinct through being brought under common ownership or control.
- The relevant jurisdictional thresholds are satisfied.

Calculation of turnover for the purposes of the Competition and Markets Authority (CMA) establishing jurisdiction depends on the JV structure. If only parts of the parents' businesses are input into the JV, the relevant turnover is the total of all the businesses that will be controlled by the JV. If the parents pool the entirety of their businesses into the JV, the relevant turnover is the totality of all the businesses minus the turnover of the largest business.

Where a JV agreement does not amount to a merger, the Chapter I prohibition may apply if it is an agreement between actual or potential competitors that may affect competition within the UK to an appreciable extent. In theory, a JV could also be assessed under Article 101 but not under Chapter I.

INTER-AGENCY CO-OPERATION

27. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

Generally, disclosure of information is restricted. However, in some circumstances, exchange of information between authorities in different jurisdictions is permitted.

UK rules

The Competition and Markets Authority (CMA) or other public authority, when exercising its powers under the Enterprise Act and other specified competition legislation (including the Competition Act), can disclose information to an overseas authority to facilitate:

- Carrying out investigations in connection with the enforcement of any relevant legislation by means of civil proceedings.
- Bringing civil proceedings for the enforcement of that legislation or the conduct of those proceedings.
- The investigation of crime.
- Bringing criminal proceedings or the conduct of those proceedings.
- Deciding whether to start or bring to an end the investigations or proceedings.

In deciding whether to disclose, the CMA must consider whether:

- The matter in relation to which the disclosure is sought is sufficiently serious to justify making the disclosure.
- There are arrangements in place for the provision of mutual assistance between the UK and the other jurisdiction in relation to disclosure.
- The law of that jurisdiction provides appropriate protection in relation to the storage and disclosure data, and against self-incrimination in criminal proceedings.

However, information gathered by the CMA during a merger or market investigation cannot be disclosed (unless there is express consent from the parties). In addition, the Secretary of State can prohibit disclosure if he considers that the overseas authority is exercising an inappropriate jurisdiction.

EU rules

For the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), national competition authorities and the European Commission can exchange and use in evidence any matter of fact or law, including, in some circumstances, confidential information (*Regulation (EC) 1/2003 on the implementation of the rules on competition laid*

down in Articles 101 and 102 of the TFEU (formerly Articles 81 and 82 of the EC Treaty) (Modernisation Regulation)).

This is subject to a number of restrictions, including that:

- The information can only be used to apply Articles 101 and 102 in relation to the subject matter for which it was originally collected.
- The information cannot be used to impose custodial sanctions on individuals.
- Exchange is subject to the rules of professional secrecy.

Disclosure is made through the European Competition Network (ECN), which consists of the European Commission and the national regulators from each EU member state. The CMA has regard to considerations in the Enterprise Act when deciding whether to disclose information under the Modernisation Regulation.

RECENT CASES

28. What are the recent developments or notable recent cases concerning abuse of market power?

The Competition and Markets Authority has started several new Chapter I (Competition Act 1998) investigations in the last two years that are still on-going, including suspected anti-competitive arrangements relating to the:

- UK online sales of licensed sport and entertainment merchandise and other consumer products.
- Precast concrete drainage products.
- Medical equipment sector.
- Pharmaceutical sector.
- Cleaning services.
- Light fitting sector.
- Supply of products to the construction industry.
- Supply of solid fuel products.
- Funfair sector.
- Residential estate agency industry.
- Auction services sector.

The CMA is also investigating suspected breaches of competition law in the pharmaceutical, car parking, consumable goods and auction sectors under Chapter II of the Competition Act.

With respect to the pharmaceutical sector, the CMA is investigating alleged anti-competitive agreements and abusive conduct relating to the sale of hydrocortisone tablets under Chapters I and II of the Competition Act and Article 101 and 102 TFEU. It is claimed that Actavis UK and Concordia International entered into agreements under which Actavis UK incentivised Concordia not to introduce its own version of hydrocortisone tablets into the UK market, thereby prolonging a period of high prices and depriving buyers (including the NHS) of significant price falls that would have resulted from true competition. The companies have until May 2017 to respond to the statement of objections.

The CMA issued decisions imposing fines and closed its investigations both with respect to certain agreements relating to paroxetine under Chapter I and II of the Competition Act and with respect to online resale price maintenance in relation to the supply of bathroom fittings in the UK. It also issued final decisions in its furniture parts cartel case, finding three companies guilty of entering into anti-competitive agreements and sharing out which customers they would supply, and published its findings against five model agencies and their trade association for colluding on prices.

The CMA took over the OFT's investigation of cartel conduct in respect of the supply in the UK of galvanised steel tanks for water storage, in which three individuals where charged with the criminal cartel offence under section 188 of the Enterprise Act 2002, one of whom pleaded guilty and was sentenced to six months' imprisonment, suspended for 12 months, and ordered to do 120 hours community service within 12 months. Separately, the CMA brought criminal charges against a man under section 188 for cartel activity and market partitioning with respect to the supply in the UK of precast concrete drainage products. He pleaded guilty to the charges in March 2016.

In addition, after extending the review period in its retail banking market investigation, the CMA published its findings and proposed remedies in February 2017. Its provisional findings in October 2015 had ruled out breaking up the "big four" banks Lloyds, RBS, HSBC, and Barclays as it was decided that they were not likely to be effective in addressing competition concerns. Instead, the CMA suggested that a lack of switching must be addressed, rejecting to end the practice of "free" banking, which refers to "free when in credit" accounts, but which may impose significant charges when in debt. In its final decision, it proposed a number of remedies including developing the API banking standard, improving customer engagement and reducing barriers to current account switching. It also proposed an 'Open Banking Remedy', based on its view that the "big four" did not have to compete hard enough for consumers' business.

The CMA has also finally closed its investigation into the private healthcare market, the final report for which had been partly quashed by the CAT at the CMA's request and remitted back to the CMA. After it was granted access to the data, HCA International Limited had found inaccuracies with the CMA's econometric analysis. Having corrected the errors and considered the new evidence, the inquiry group unanimously confirmed that there were adverse effects on competition in the market for private healthcare services in central London. However, it concluded that there were no further remedies that would be both effective and proportionate. This does not affect other findings, including the CMA's order to provide better information for patients on doctor performance, and a crackdown on incentive schemes by private hospital operators for referring clinicians, which have since been implemented.

In 2015, the CMA published its final order in the payday lending market investigation, requiring online payday lenders to publish details of their products on at least one price comparison website authorised by the Financial Conduct Authority, as well as to provide customers with detailed and clearer information on costs to increase competition and transparency.

After consulting on its proposals, the CMA has also published its findings into the energy market investigation which was launched following widespread anger regarding high prices. It brought in over 30 measures including an Ofgem controlled database, which will allow competitors to contact customers that have been with the same energy provider for more than three years, price control for prepayment meters, measures to strengthen price comparison websites, and measures to strengthen Ofgem's independence and reporting powers, to increase competition and transparency in the market.

PROPOSALS FOR REFORM

29. Are there any proposals for reform concerning restrictive agreements and market dominance?

There are currently no concrete proposals for reform following the UK's Consumer Rights Act 2015 coming into force.

In addition, it was announced in the Queen's Speech on 18 May 2016 that the UK government is considering a "Better Markets Bill", which aims to:

- Open up markets.
- Boost competition.
- Give consumers more power and choice.
- Make economic regulators work better.

However, no further details or timelines have emerged and there are no plans for it to be dealt with in the 2017 "wash-up" before Parliament is dissolved ahead of the general election.

ONLINE RESOURCES

Official Home of UK Legislation

W *www.legislation.gov.uk*

Description. Official government website where all UK legislation can be found, including the Enterprise and Regulatory Reform Act 2013, the Enterprise Act 2002 and the Competition Act 1998.

Competition and Markets Authority (CMA)

W *www.gov.uk/government/organisations/competition-and-markets-authority*

Description. The CMA's official website. Contains the CMA guidelines issued, and those of the Office of Fair Trading and Competition Commission issued before 1 April 2014 but subsequently adopted by the CMA Board.

Competition Appeal Tribunal (CAT)

W *www.catribunal.org.uk*

Description. The CAT's official website. The CAT Rules 2003 set out the procedure for a follow-on action for damages before the CAT.

THE REGULATORY AUTHORITIES

Competition and Markets Authority (CMA)

Head. David Currie (Chairman) and Andrea Coscelli (Acting Chief Executive)

Contact details. Victoria House, 37 Southampton Row, London , WC1B 4AD, United Kingdom **T** +44 20 3738 6000 **E** *general.enquiries@cma.gsi.gov.uk* **W** *www.gov.uk/government/organisations/competition-and-markets-authority*

Outline structure. The CMA is an independent public body, regulated by a board of 12 members, including the Chairman, Chief Executive, three executive directors and seven non-executive directors.

Responsibilities. The CMA's main competition responsibilities are to:

- Investigate mergers under the Enterprise Act that could restrict competition, and specify measures that the merging parties must take to prevent or unwind integration between them while the investigation takes place.
- Conduct market studies and investigations under the Enterprise Act in markets where there may be competition and consumer problems, or into practices that impact more than one market, and to require market participants to take steps to address these problems.
- Investigate where there may be breaches of UK or EU prohibitions against anti-competitive agreements and abuses of dominant positions, under the Competition Act.
- Bring criminal proceedings against individuals who commit cartel offences under the Enterprise Act.
- Enforce consumer protection legislation to tackle practices and market conditions that make it difficult for consumers to exercise choice, and bring criminal proceedings under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).
- Co-operate with sector regulators and encourage them to use their competition powers more proactively, including the designation of the body who should lead on a case.
- Consider regulatory references and appeals, in relation to price controls, terms of licences or other regulatory agreements under sector specific legislation (gas, electricity, water, post, communications, aviation, rail and health).

Procedure for obtaining documents. The CMA's website provides detailed information about decisions under the Competition Act, and consultations and decisions on mergers and market investigations (*see above, Contact details*).

Competition Appeal Tribunal (CAT)

Head. The Hon Mr Justice Roth (President)

Contact details. Competition Appeal Tribunal, Victoria House Bloomsbury Place, London , WC1A 2EB, United Kingdom **T** +44 20 7979 7979 **F** +44 20 7979 7978 **W** *www.catribunal.org.uk*

Outline structure. The CAT is a specialist independent tribunal established to hear appeals under the UK and EU competition law provisions.

Cases are heard before a Tribunal consisting of three members, either the President or a member of the panel of chairmen (comprising judges of the Chancery Division of the High Court and other senior lawyers) and two ordinary members (who have expertise in law or related fields such as economics, business and accountancy).

Responsibilities. The CAT hears appeals from decisions by the CMA, the Secretary of State and the sectoral regulators. It can consider the case merits, errors of fact and law, or improper use of powers or discretion, and can:

- Dismiss the application.
- Confirm, set aside, or vary the CMA's decision.
- Remit the matter to the CMA or the sectoral regulator.
- Give such directions, or take such other steps as the CMA or the sectoral regulator could have given or taken.
- Make any other decision the CMA or the sectoral regulator could have made.
- Impose, revoke or vary the amount of any penalty.

Procedure for obtaining documents. Current cases, judgments, procedural rules and guidance are available on the CAT's website (*see above, Contact details*).

The Department for Business, Energy & Industrial Strategy

Head. Greg Clark (Secretary of State)

Contact details. Ministerial Correspondence Unit Department for Business, Energy & Industrial Strategy, 3rd Floor, 1 Victoria Street, London, SW1H OET, United Kingdom **T** +44 20 7215 5000 **F** +44 20 7215 0105 E *enquiries@beis.gov.uk* **W** *www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy*

Outline structure. The Department for Business, Energy & Industrial Strategy is a government ministry. The Minister of State currently responsible for competition policy is Margot James MP.

Responsibilities. The Department for Business, Energy & Industrial Strategy formulates UK government policy on competition law.

Involvement in merger and market investigations is limited and the Secretary of State is only involved in:

- Merger investigations that raise public interest issues on national security grounds, newspapers or other media ownership, and the maintenance of the stability of the UK financial system.
- Market investigations where the Secretary of State is not satisfied with a CMA decision not to conduct a Phase 2 investigation, or that the CMA will reach a decision on a Phase 2 investigation within a reasonable time or on public interest grounds.

Procedure for obtaining documents. Decisions made by the Secretary of State, are available as press releases on the Department for Business, Energy & Industrial Strategy website. Consultation papers and guidance are also available on the website (*see above, Contact details*).

Practical Law **Contributor profiles**

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Areas of practice. EU and UK competition law.

Recent transactions

- Advising American International Group on obtaining global merger control approval in respect of its US$7.6 billion sale of International Lease Finance Corporation.
- Advising Clayton, Dubilier & Rice in obtaining European Commission (EC) clearances for its US$1.8 billion acquisition of Ashland Water and its US$500 million investment in CHC Group Ltd.
- Advising Dell Inc. on obtaining global merger control approval, including in the EU, in respect of being taken private by Michael Dell in a transaction valued at approximately US$24.9 billion.
- Advising Access Industries in obtaining EC clearance for its acquisition of Warner Music Group (WMG) and, subsequently, WMG on obtaining EC clearance for its US$765 million acquisition of Parlophone Label Group from Universal Music Group.
- Advising Northwestern Mutual in obtaining UK merger control approval for the sale of its subsidiary company Russell Investments to the London Stock Exchange Group.

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