

CIPA informals – Competition (antitrust) law – 14 May 2024

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What is competition/law?

Competition means *commercial rivalry*, which is relied upon together with the *self-interest of entrepreneurs* to balance supply and demand in a free market economy. Competition should ensure that resources are directed to where they are the most valuable (economically)

Competition *law* is a set of binding rules designed to keep competition free.

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EU Commission's view

As expressed at UNCTAD 2014 *Roundtable on The Benefit of Competition Policy for Consumers*

“... competition is not an end in itself. It contributes to an efficient use of society's scarce resources, technological development and innovation, a better choice of products and services, lower prices, higher quality and greater productivity in the economy as a whole.”

https://unctad.org/system/files/non-official-document/CCPB_IGE2014_RTBenCom_EU_en.pdf

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Goals of competition law

- Consumer welfare
- Competitive structure of the market
- Efficiency
- Market integration (special to EU)

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Competition vs unfair competition laws (and IP)

'Competition law' ('anti-trust' in US) – ensures there is *enough* competition, so that market forces, Adam Smith's 'invisible hand', can operate effectively

- Underpins competitive social market economy (Art 3 and protocol 27 TFEU)
- protects competition; underlying assumption that free market competition benefits society/consumer welfare

'Unfair competition laws' – whether competition is of the *right kind*

- protects competitors and (indirectly) consumers
- BUT, increasing emphasis on fairness (procedural AND substantive, social context) in competition enforcement

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How to improve your trading position - possible competitive tactics

- Design innovative products & launch onto market
- Use clear, honest & informative labelling, ads
- Acquire & exercise IP rights
- Form contractual alliances with other market players
- Pay potential competitors to delay entering market
- Take over or merge with other firms
- Achieve dominant position, eg 70% market share
- Abuse dominant market position, eg by refusing to deal or supply except on onerous terms
- Poach competitors' best employees
- Set fire to competitor's factory

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Note: continuing relevance of EU law

- UK Competition Act 1998 provisions on restrictive practices (Ch I) and abuses of dominance (Ch II) were modelled closely upon EU law, the idea being to minimise the burden of compliance
- Decisions of the CJEU up to end 2020 formed part of 'retained EU law', later decisions of persuasive authority on interpretation; however, Retained EU Law (Revocation and Reform) Act 2023 (from 1 Jan 2024) reversed supremacy of EU law and modified rules for courts' application of earlier caselaw
- Retention of 'Block Exemption Regulations' for UK
- EU law has 'extraterritorial' effect

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'Extra-territorial' reach of EU competition law; what about UK?

"*Qualified effects test*" – does anticompetitive behaviour have immediate, substantial and foreseeable effect in the EU? If so, EU law applies to conduct outside EU: *Intel C-413/14 P*

Brexit will not prevent exposure to liability under EU law in these circumstances, though UK law traditionally hostile towards effects tests.

Woodpulp C-89/85 ("implementation" test for cartel); current equivalent in S2(3) of Competition Act 1998, is due to be repealed by Digital Markets, Competition and Consumers Bill 2022-23, which will leave effects in UK as sufficient.

Also, '*single economic entity*' test

Iiyama v Samsung [2018] EWCA Civ 220, discusses the 3 tests

Meanwhile, information-gathering powers of CMA seen as having broad extra-territorial reach in *CMA v VW* [2023] EWCA Civ 1506)

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Sources of competition law for UK

- Retained EU law
 - EU treaty and subordinate legislation; decided cases from CJEU and GC
- UK legislation
 - Statute of Monopolies 1623
 - Competition Act 1998
 - Enterprise Act 2002
 - Enterprise and Regulatory Reform Act 2013 (ERRA 2013)
 - Subsidy Control Act 2022 (fully in force from 4 Jan 2023)
 - <https://www.gov.uk/government/collections/subsidy-control-regime>
 - Digital Markets, Competition and Consumers Bill 2023, first reading on 25 April 2023, now reaching final stages. Ch 2 concept that an undertaking may be designated as having 'Strategic Market Status' (substantial and entrenched market power) & be subject to guidance on conduct from the CMA's Digital Markets Unit. Bill also contains some changes for UK merger control
- Common law doctrine of 'restraint of trade' (prevents enforcement of unduly restrictive agreements)

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Forms of enforcement

Administrative – competition authorities

UK Competition and Markets Authority

Proposals to increase CMA's powers of evidence-gathering and penalties, though existing info powers interpreted widely in *CMA v VW* [2023]

Digital Markets, Competition and Consumers Bill 2022-23 (HC Bill 294) Pt 2

Sectoral regulators, eg OFCOM, FCA

European Commission, DG Competition

Civil – litigation in the courts (including UK's Competition Appeal Tribunal, or 'CAT')

Proposals to expand CAT jurisdiction

Digital Markets, Competition and Consumers Bill 2022-23 (HC Bill 294) Pt 2

Criminal – prosecutions in the UK criminal courts (not EU)

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Forms of enforcement: 'Administrative'

finances, cease & desist, and other behavioural orders

- Eg fine in excess of €120m for 'jumping the gun' in merger upheld in 2021 by General Court, *Altice v. European Commission* Case T-425/18
- €13.4 million for pharma cartel
<https://www.lawsociety.ie/gazette/top-stories/2023/october/eu-imposes-first-cartel-fines-in-pharma-sector>
- €1.8 billion for abuse of dominant position by Apple in restricting availability of music streaming apps
https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1309
- *Google (Shopping)* C-48/22 P A-G Kokott recommends upholding €2.4 billion fine
- Commission 'ECN+' directive 2019/1 to empower competition authorities of Member States to be more effective enforcers and ensure proper functioning of the internal market (deadline for transposition was 4 Feb 2021, so not UK)

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Forms of enforcement: Civil, or 'private enforcement'

Litigation through the civil courts (damages, injunctions, etc; also 'Euro defences', which have long pedigree)

- Possibility of direct, follow-on, and collective CAT actions in UK under Consumer Rights Act 2015 (criteria for collective actions made easier to apply by decision in *Merricks v Mastercard* [2020] UKSC 51); see also *Royal Mail v DAF Trucks* [2023] CAT 6, appeal dismissed [2024] EWCA Civ 181. 'Opt-out' or 'opt-in' bases, discussed in *BT v Le Patourel* [2022] EWCA Civ 593
- Further CAT tweaks to come when Digital Markets, Competition and Consumers Bill 2023 (HC Bill 294) passes into law
- Commission Directive 2014/104/EU, implemented in UK by Claims in Respect of Loss or Damage for Competition Infringement... Regs 2017 SI 2017/104

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Forms of enforcement: Criminal

- prosecution of offenders in criminal courts (fines, imprisonment)
- “cartel offence” in UK
- not EU
- enables sanctions to be imposed on individuals
- Few convictions (guilty pleas); requirement of dishonesty removed by ERA 201; collaboration with Serious Fraud Office. See, eg <https://www.nortonrosefulbright.com/en/knowledge/publications/51dd9da8/the-future-of-the-criminal-cartel-offence-in-the-uk>

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Competition law applies to ‘undertakings’

- Economic and legal concept of ‘undertaking’
- “The concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and way in which it is financed”

Hofner and Elser v Macrotron [1991] ECR I-1979

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Competition operates in a market

Seen as having dimensions of

- product market (substitutability)
- geographical market (where conditions of comp homogeneous)
- temporal market (sometimes)

United Brands [1978] ECR 207; 1 CMLR 429 (bananas)

Re technology licensing, Commission distinguishes between *technology market* (ie where licensors compete) and *product market* (ie where licensees compete)

Updated *Commission Notice on the definition of the relevant market for the purposes of Union competition law* OJ C/2024/1645

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6001

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Algorithms, AI and competition law

Tech developments rapidly changing

- the way competition takes place
- the way that behaviours and transactions need to be assessed, eg others' prices can be tracked and followed without direct collusions

The CMA is working on such issues. This can be seen, in its cases and projects

<https://www.gov.uk/cma-cases>

<https://www.gov.uk/cma-cases/ai-foundation-models-initial-review#full-publication-update-history>

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Contractual alliances

- Restrictive agreements are regulated, eg restrictive provisions in licenses, assignments of IP, R&D agreements
- Art 101 TFEU /Chapter I of UK Competition Act
- applies to IP transactions

Consten & Grundig v Commission [1966]

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Art 101 (1) TFEU: the prohibition

“The following shall be *prohibited as incompatible with the internal market*: all *agreements between undertakings*, decisions by associations of undertakings and concerted practices which may *affect trade between Member States* and which have as their *object or effect* the *prevention, restriction or distortion of competition* within the internal market, and in particular those which:

- (a) directly or indirectly *fix purchase or selling prices* or any other trading conditions;
- (b) *limit or control production, markets, technical development, or investment*;
- (c) *share* markets or sources of supply;
- (d) apply *dissimilar conditions to equivalent transactions* with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of *supplementary obligations* which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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*Art 101 (1) TFEU: the prohibition and its equivalent
Chapter I of UK Competition Act 1988 (as amended)*

- Prohibition; directly applicable
- Parties in breach may be investigated by Commission (EU) or UK CMA, and fined
- Restrictions ‘By object’ (no need to prove effect), interpreted restrictively since *Cartes Bancaires* C-67/13 P (2014); geo-blocking considered ‘by-object’ in *Valve Corp v European Commission* T-172/21 (2023)
- But, include pay-for-delay agreements/ settlements with generic pharma companies, at least where no other explanation: *Generics/Paroxetine* C-307/18 (2020) and [2021] CAT 9; *Citalopram* C-586/16P (2021, CJEU)

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small fry – ‘*de minimis*’

Volk (Franz) v Vervaecke Case 5-69 [1969] ECR 295

- Very small exclusive dealing agreement may escape prohibition if *no appreciable effect* on interstate trade

Commission’s ‘Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union’ [2014] OJ C291/1 and ‘Guidance’

Low market shares (10% combined if competitors, 15% each for non-competitors) and absence of anti-competitive object (eg price-fixing)

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Art 101(2) TFEU: the consequence

“Any agreements or decisions prohibited pursuant to this article shall be automatically void.”

- Inability to enforce the restriction, and possibly the whole agreement if restriction cannot be ‘severed’.

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Art 101(3) TFEU: the let-out clause

“The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or *category* of agreements between undertakings,
 - any decision or category of decisions by associations of undertakings,
 - any concerted practice or category of concerted practices,
- which *contributes to improving the production or distribution* of goods or to *promoting technical or economic progress*, while *allowing consumers a fair share of the resulting benefit*, and which does not:
- (a) impose on the undertakings concerned *restrictions which are not indispensable* to the attainment of these objectives;
 - (b) afford such undertakings the *possibility of eliminating competition* in respect of a substantial part of the products in question.”

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'Crisis cartels'

- In the past, if a sector of the economy was in a bad way, a 'crisis cartel' might be justified to prevent collapse *Synthetic Fibres* [1984]
- During the COVID 19 pandemic, many agreements and collaborations (as well as subsidies) were deemed necessary and permissible, under EU and UK competition law
- https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf
- <https://www.gov.uk/guidance/competition-law-exclusion-orders-relating-to-coronavirus-covid-19>

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'Block Exemption' Regulations ease impact of Art 101 on 'categories' of agreement

- Important ones for IP were retained, as amended to apply within the UK, until expiry
- Expired ones are being replaced in UK by Block Exemption Orders (secondary legislation), with changes
- Reg 63 and Schedule 3 of The Competition (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/93, as amended by SI 2020/1343)

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'Block exemption' Regulations

Research & Development: Reg 2023/1066 ('R&D')

- Useful for government/university/industry projects – could have more than 2 contracting parties. Important condition: access to results
- Replaced by BEO 2022/1271 in UK

Technology licensing (for production): Reg 316/2014 ('Tech transfer')

- Useful when licensing patents, knowhow, designs, plant variety rights, copyright in software, not copyright generally or trade marks. Allows a surprising range of restrictions, especially when licensor and licensee are not in competition. Must be consulted when negotiating/drafting licences. Due to expire 30 April 2026.
- Commission Guidelines informative

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Block exemption Regulations

Distribution agreements (incl franchising): new "Verticals" Reg (EU) 2022/720 and UK Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, SI 2022/516, both in force from 1 June 2022

- Most commercial production requires a means for distribution of goods and services.
- Cover trade mark aspects of distribution
- Both more sympathetic than predecessors to differences between on-line and bricks-and-mortar sales, selective distribution networks; nuanced as to hybrid online platforms that sell as well as host

Specialisation – to rationalise industry: Reg 2023/1067

One or more parties agree to restrict production, cf crisis cartels

- Replaced in UK by BEO 2022/1270

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‘Monopolisation’ – acquisition of a dominant position; merger control

Acquisition of dominant position **not** prohibited as such under EU/UK law, unlike under US law. But...

Relevant to blocking or clearing of mergers, acquisitions, etc, under EU ‘Merger Regulation’ Reg (EC) No 139/2004, no expiry date, but reform of procedures from 1 September 2023

<https://www.herbertsmithfreehills.com/insights/2023-12/european-commission-adopts-major-reforms-to-eumr-merger-review-procedures>

Expansion of scope for Member States to refer ‘killer acquisitions’ under Art 22 and the Commission’s new willingness to examine them was approved in *Illumina/Grail* T-227/21, divestment plan approved

https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1964

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Merger control in the UK

Under Enterprise Act 2002, UK merger rules

- Test is similar to EU – substantial lessening of competition
- Certain public interest powers to block mergers
- Important to conduct IP audit as part of ‘due diligence’
- UK guidance on merger remedies (CMA87), incl guidance on IPR remedies
- New CMA Phase 2 procedures for in-depth merger scrutiny in force 23 April 2024

Further changes to UK regime are included in Digital Markets, Competition and Consumers Bill 2023

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Abuse of a dominant position: *Art 102 TFEU (ex Art 82EC, Art 86EEC)*

“Any *abuse* by one or more undertakings of a *dominant position* within the internal market or in a *substantial part* of it shall be *prohibited* as *incompatible* with the internal market insofar as it may *affect trade* between member states. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing *unfair purchase or selling prices* or other unfair trading conditions
- (b) *limiting production, markets or technical development* to the prejudice of consumers
- (c) applying *dissimilar conditions to equivalent transactions* with other trading parties, thereby placing them at a competitive disadvantage
- (d) making the conclusion of contracts subject to acceptance by the other parties of *supplementary obligations* which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Ch II of UK Competition Act follows

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Art102 / Ch II

Note: no let-out equivalent to Art 101(3). If conduct can be justified economically, especially as meeting competition rather than stifling it, that conduct may escape the prohibition.

- Commission Guidance paras 28-31 (necessity) para 30 (efficiency)

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Forms of abuse of dominance

Exploitative, eg

- unfair pricing

Exclusionary, EU Commission mainly concerned about this, eg

- predatory pricing
- margin squeeze, rebates
- exclusive dealing
- refusal to license or supply
- subversion of standard-setting
- misuse of SPC registration system

Discriminatory

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Some cases on Art 102

- *Euro-fix Bauco Hilti AG v Commission* C-53/92 P [1994] tying, refusal to supply/license, etc
- *Volvo v Veng* Case 238/87 [1988] (spares, *special* circumstances in which may be abuse)
- *Rambus* Case COMP/38.636 (2009), ambush of standard-setting *AstraZeneca AB v Commission* T-321/05 [2010] upheld by CJEU Case C-457/10 P [2012], SPCs
- *Re Google Search (Shopping)* Search engine privileging own comparison shopping service C-48/22 P
- *Allergan v CMA* [2023] CAT 56 raising of hydrocortisone prices by 10,000% over 10 years

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Another area of competition regulation: 'State aids' or subsidies

Articles 107-109 TFEU

- Prohibition on Member States distorting competition by subsidies or special privileges.
- Aid allowable for research, infrastructure projects, etc: 'General Block Exemption Regulation' Reg (EU) 651/2014 (applicable 1 July 2014; more generous than earlier Regs)
- Specific projects may be cleared
- EU worry about 'level playing field' post-Brexit includes subsidies

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State Aids, COVID and Brexit

- https://ec.europa.eu/info/system/files/management-plan-comp-2020_en.pdf (recovery and subsidies or 'state aids')
- EU law still relevant to NI under Protocol
- UK's Subsidy Control Act 2022, in force 4 January 2023
- Intended to comply with UK-EU Trade and Cooperation Agreement, and WTO obligations
- More autonomy to local authorities, but subject to guidance and review from CMA
- Transparency database
<https://searchforuksubsidies.beis.gov.uk>

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Uncertain area for UK IP– exhaustion of rights

- Rights are ‘exhausted’ by legitimate marketing, so that movement of IP-protected goods (and sometimes services) cannot thereafter be controlled by the IP owner
- EU operates ‘regional’ exhaustion (within EEA)
- Post-Brexit, UK has operated ‘asymmetric’ or ‘unilateral’ system; regional rule in the UK but not *vice versa*

UK Government consultation; 4 options, including full international exhaustion

- outcome inconclusive, so continuing for now with unilateral system (option 1)

<https://www.gov.uk/government/consultations/uks-future-exhaustion-of-intellectual-property-rights-regime/the-uks-future-regime-for-the-exhaustion-of-ip-rights>

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Final remarks

Any questions?

Many issues important to clients not considered today, eg leniency programmes

Thank you for listening!

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