

United Kingdom National Report – LIDC Congress Paris 2019

Question A: *To what extent should competition law be concerned with differences in prices, terms and conditions and quality to different purchasers?*

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This Report has been prepared to assist the International Rapporteur in reporting to the LIDC Congress in Paris in November 2019. It has been prepared in accordance with the Directives and Instructions issued by LIDC. It follows the structure of the questions for National Reporters that were issued in April 2018, which deal with discriminatory practices. A draft version of this report was circulated to members of the Competition Law Association (“CLA”) on 29 May 2019. This version of the Report incorporates the views expressed by CLA members at the meeting.

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1. The notion of discrimination in national/regional substantive legal framework

- 1.1. There are three main pieces of legislation that define the competition legal framework in the United Kingdom which concern different price, terms and conditions and quality treatment of different purchasers. These are the Competition Act (CA98), which entered into force on 1 March 2000, and introduced competition law rules that closely resemble Articles 101 and 102 of the Treaty of Functioning of the European Union (TFEU). Next, the Enterprise Act 2002² (EA02), which introduced market investigations and provisions that may be contained in certain enforcement orders.³ Thirdly, the Enterprise and Regulatory Reform Act 2013 (ERRA), which introduced new investigation and enforcement powers. These provide for strengthened powers and more robust decision-making in the enforcement of competition law in the UK, particularly by sharing CMA's enforcement powers with sectors regulators.
- 1.2. The CA98 and ERRA give the CMA together with 9 sector regulators shared powers to enforce the EU and UK competition rules.
- 1.3. These concurrent regulators are as follows: 1. Civil Aviation Authority (CAA), 2. Financial Conduct Authority (FCA), 3. Gas and Electricity Markets Authority (Ofgem), 4. Northern Ireland Authority for Utility Regulation (NIAUR), 5. Office of Communications (Ofcom), 6. Office of Rail and Road (ORR), 7. Payment Systems Regulator (PSR), 8. Water Services Regulation Authority (Ofwat), and 9. Monitor, National Health Service regulator.

Chapter I prohibition

- 1.4 The Chapter I prohibition in the CA98 prohibits agreements between undertakings that may affect trade in the UK and which have the object or effect of restricting competition within the UK or a part of the UK. To be caught by the Chapter I prohibition, the agreement must also have an appreciable effect on trade within the UK.
- 1.5 The relevant provision in The Chapter I prohibition contains a non-exhaustive list of examples of anticompetitive agreements which states that agreements with object or effect of restricting competition in the UK are prohibited, in particular, when they “apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”.⁴

² Enterprise Act 2002, Part 4

³ Ibid, Schedule 8

⁴ CA98, S2(2)(d)

Exemptions

- 1.6 Agreements caught by the Chapter I prohibition will, however, be exempt from the prohibition, and escape the consequences of infringement, if they satisfy the criteria, listed in section 9 of the Competition Act. Parties to an agreement can also request an opinion of the CMA on whether an agreement is caught by Chapter I prohibition or can ask for informal advice. Slightly different rules apply to opinions and advice requested from and issued by the CMA.
- 1.7 To meet the section 9 exemption criteria, an agreement must satisfy all of the following three conditions: a) it must contribute to improving production or distribution or to promoting technical or economic progress; b) consumers must be allowed a fair share of the resulting benefit; and c) the restrictions must be indispensable to achieve those objectives.
- 1.8 Agreements can also be exempt if they fall within the scope of the of UK or EU block exemption, in the case of the latter, the parties to an agreement will benefit from the EU block exemption by virtue of parallel exemption from the Chapter I prohibition.
- 1.9 In the event Britain leaves the EU without a transition agreement, agreements will continue to benefit from the European Commission block exemption regulations.⁵
- 1.10 The Secretary of State, on the recommendation of the CMA, may by order make "block exemptions" which exempt certain categories of agreements that are considered likely to satisfy the criteria for exemption under section 9 of the CA98. An agreement that meets the conditions set out in a block exemption order is automatically exempt from the Chapter I prohibition.
- 1.11 The only block exemption currently adopted under the Competition Act initially came into force on 1 March 2001 and concerned public transport tickets.⁶
- 1.12 Further exemptions are provided by the virtue of de minimis notice issued by the European Commission, to which the CMA will have regard. Generally, this applies to agreements of 'minor importance', in the markets where the parties aggregate market share does not exceed 10% on any of the relevant markets affected or the market share of each of the parties to the agreement does not exceed 15% on any of the relevant markets. A

⁵ The CMA confirmed this in a guidance note issued on 30 October 2019: <https://www.gov.uk/government/publications/cmas-role-in-antitrust-if-theres-no-brexite-deal/cmas-role-in-antitrust-if-theres-no-brexite-deal>

⁶ Public transport ticketing schemes block exemption adopted in 2001 for 25 years.

further condition is that the agreement in question is made between non-competing undertakings, which are neither actual nor potential competitors on any of the markets concerned.

1.13 Hardcore restrictions do not benefit from any exemptions.

Chapter II prohibition

1.14 Chapter II prohibition of the Competition Act prohibits any abuse by one or more undertakings of a dominant position within the UK, or any part of it, which may affect trade in the UK.

1.15 There is no exclusion from the Chapter II prohibition.

1.16 According to the case law of the EU, with which the OFT guidelines on abuse of a dominant position have adopted a consistent approach, a company with a market share of 40% or more is presumed to be dominant. The CMA has adopted this guideline.

1.17 Dominance is not prohibited by Chapter II prohibition, only its abuse is. Examples of abuses of a dominant position which are particularly relevant to vertical agreements or relationships are discriminatory pricing, predatory pricing which is generally understood to be pricing at very low levels with a view to excluding competitors; refusal to supply without justification; fidelity rebates or fidelity inducing rebates and "English clauses" - whereby the buyer is required to report to the supplier any offer that has more attractive terms, and can only accept such offer if the supplier does not match it. Other abusive types of behaviour include non-compete obligations on purchasers or payments in return for exclusivity.

1.18 Issues arising about the Chapter II prohibition must be dealt with consistently with the treatment of corresponding issues arising under EU law.

1.19 Agreements can be found abusive if a supplier or distributor has a dominant position in the relevant market. Restrictions imposed by either party to an agreement, even where they are contained in an agreement that is not caught by Chapter I prohibition, may constitute abuses under the Chapter II prohibition, particularly if they have the effect of market foreclosure.

1.20 By virtue of the Enterprise Act,⁷ the relevant authority can impose an enforcement order, which can prohibit, among others, (a) discrimination between persons in the prices charged for goods or services; (b) anything which the relevant authority considers to be such discrimination; (c) procuring others to do anything which is such discrimination or which the relevant authority considers to be such discrimination.

⁷ Schedule 8 (5)

- 1.21 Market studies and market investigations are further tools at the disposal of UK competition authorities, which use has been on the increase of late.
- 1.22 The CMA can conduct market studies and market investigations to verify if markets are not working as well as they could, to look at potential broader structural concerns in any given sector, even where there is no evidence of an infringement of UK or EU competition law.
- 1.23 Market studies are used as a first screen to assess the functioning of a market and to determine whether a more in-depth study is warranted, in which case a reference for a market investigation is made. Market studies also often serve as a first phase fact-finding exercise through which the CMA informs itself about the working of a particular market or broader sector. Where a sector is subject to specific sector regulation, regulators with concurrent competition enforcement powers can also carry out this first phase market study.
- 1.24 EA02⁸ gave the CMA discretionary power to make a market investigation reference where it has reasonable grounds for suspecting that any feature, or combination of features, of a UK market for goods or services, is not working as it should.
- 1.25 UK supermarkets inquiry was conducted using such powers under previous monopoly provisions, and it looked at the relationship between buyers and sellers and identified that some supermarkets may exert too much buyer power, which ultimately resulted in establishing of the Groceries Code Adjudicator and strengthening the Supermarkets Code of Practice.
- 1.26 The purpose of UK market investigations is to make the competition more effective in situations where particular features of a market appear to be facilitating anti-competitive effects and adverse consumer outcomes but where such problems cannot necessarily be attributable to individual infringements of relevant UK or EU competition law provisions governing anti-competitive agreements and unilateral conduct.
- 1.27 The emphasis of these reviews is therefore normally on broader structural concerns, focusing more on consumer behaviour or sector practices rather than the conduct of individual companies.
- 1.28 This broader approach makes market investigations a particularly flexible tool for the UK authorities to assess and remedy a number of problems that may affect markets and it has been applied several times to investigate discriminatory practices. On this basis, market investigations may review issues such as how companies interact

⁸ Section 131(1)

with suppliers and customers, their pricing of goods and services, the information available to customers on prices and service to compare different providers, among others.

1.29 In market investigations, detailed examinations are made into whether there is an adverse effect on competition (AEC) in the market referred and, if AEC is established, to determine remedial action that may be appropriate.

In the case of a finding of AEC, the CMA can impose wide-ranging remedies, including ordering companies to divest assets to boost competition in the market and changing the terms upon which a company does business.

1.30 In terms of timing, an initial market study can take up to a year to complete. Where there is a market investigation reference, a possible additional 24 months will be added.

1.31 The EA02 introduced a new right for certain designated consumer bodies to make a "super-complaint" to the CMA, where they consider that there are market features, such as particular market conduct of firms operating in the market or the market structure itself, that may be harming UK consumers⁹.

1.32 Guidelines produced by the OFT and later adopted by the CMA as well as those produced by sector regulators are useful guidance for undertakings operating in the UK.

1.33 Competition Appeal Tribunal (CAT) is a specialist competition court, which hears appeals of competition authorities' decisions as well as private actions for damages or injunctions.

1.34 Following the changes to UK competition law introduced on 1 May 2004, agreements are, in effect, automatically exempt from the Chapter I prohibition if section 9 criteria are fulfilled. Before this, agreements had to be notified for an individual exemption. Before May 2005, with the exception of hardcore increments, such as price-fixing, vertical agreements were excluded from the Chapter I prohibition by statutory order issued by the Secretary of State under powers in the CA98¹⁰ through Land and Vertical Agreements Exclusion Order 2000. This exclusion was repealed by the Competition Act 1998 in order to align UK law with EU law following the adoption of Regulation 1/2003. Therefore, since 1 May 2005, a vertical agreement that restricts competition is not excluded from the scope of the Chapter I prohibition but may still be exempt from the Chapter I prohibition if any of the exclusion rules described in the earlier paragraphs apply.

1.35 Before the CA98 came into force, under the Resale Prices Act 1976, collective RPM was unlawful and individual RPM (that is vertical RPM, for example, between a supplier and a dealer) was unenforceable except

⁹ Last such complaint was lodged by Citizens Advice about 'loyalty penalties', where longstanding customers pay much more than new consumers for the same service, in 2018.

¹⁰ CA98 section 50

for a limited exemption for loss-leaders or unless a successful application for exemption was made to the Restrictive Practices Court. Only two successful applications were ever accepted by the Restrictive Practices Court, for books and pharmaceuticals.

1.36 Refusal to supply of loss leading product was permissible under Resale Prices Act 1976 but subsequent OFT draft document¹¹ suggested that a policy of loss leading may be justified and would not be considered predatory, indicating that it may be objectionable under Chapter II prohibitions. No further official guidance has been issued in the area.

1.37 Consumer protection regulations also deal with discrimination and prohibit certain types of consumer discrimination¹², such as discrimination based on residence or nationality. The UK competition authority is also responsible for consumer protection and will sometimes use its consumer protection powers, where competition rules failed to deliver the desired effect,¹³ or where it may be easier to fix a malfunctioning feature of the market using consumer protection rules.

1.38 As recently as April 2019, in its merger prohibition decision between Sainsbury's and Asda,¹⁴ the CMA highlighted that it the CMA's statutory duty explicitly prioritises consumers: 'The CMA must seek to promote competition, both within and outside the UK, for the benefit of consumers'.¹⁵

1.39 Intellectual property laws and, in particular, fair reasonable, non-discriminatory rates charged by the holders of standard-essential patents (SEP) are a legal area where English courts tackled the issue of fairness and discrimination.¹⁶

2 The notion of discrimination in practice by competition authorities/courts

2.1 The UK has an ample body of case law related to investigating, sanctioning and litigating discriminatory market practices. The cases are initiated equally ex officio as well as by complaints.

2.2 Discriminatory practices may be just one factor in cases investigated or litigated by the UK authorities. In many cases a fine was imposed but, equally, some had imposed injunctions to stop the anticompetitive behaviour or they were settled through commitments that rectified their behaviour.¹⁷

¹¹ OFT's Assessment of Conduct, 2004

¹² Consumer Protection from Unfair Trading Regulations 2008

¹³ The CMA launched consumer law investigation into hotel booking sites on 27 October 2017, having previously investigated the market using its competition powers.

¹⁴ Decision in anticipated merger between J Sainsbury PLC (Sainsbury's) and Asda Group Ltd (Asda), part of Walmart Inc. (Walmart)

¹⁵ Enterprise and Regulatory Reform Act (ERRA) s25(3)

¹⁶ *Conversant Wireless Licensing S.à.r.l. v Huawei Technologies Co Limited and others* in the Intellectual Property List, Business and Property Courts, High Court of Justice of England and Wales; *Unwired Planet International v Google & ors*, in the Patents Court of the Chancery Division, High Court of Justice of England and Wales;

2.3 As the following examples of UK practice show, the discrimination most often occurs in the form of price discrimination and access to a facility, with exclusionary effects. This practice trends are changing though. Most recent example show elements such as online/offline as well, personalisation of services, including prices, and quality are among factors present in discriminatory practices investigated by the competition authorities.

2.4 In terms of decisions and fining in cases involving discriminatory practices, cases have most often been sanctioned under Chapter II prohibition, as per below list of notable fining decisions.

Authority	Case	Fine Imposed (m) GBP	Company
CMA	CE/9742-13	89.00	Flynn/Pfizer
Ofcom	CW/01122/01/14	50.00	Royal Mail
Ofgem (GEMA)	CA98 STG/06	15.00	National Grid
OFT	CA98/02/11	10.00	Reckitt Benckiser
ORR	n/a	1.40	EWS
OFT	CA98/3/2003	3.00	Genzyme
CMA	CA/2/2001	2.00	Napp
OFT	CA98/14/2002	1.00	Aberdeen Journals
	Total GBP:	171.40	

2.5 An example of primary line discrimination, which went under scrutiny of the ORR and which concluded with a fine, was EWS’s coal-haulage contracts. The investigation resulted in GBP1.40m fines for infringing the Chapter II prohibition, through its imposition of exclusionary prices and use of contracts with exclusionary effect in relation to coal-haulage by rail as well as an anti-competitive strategy through its agreements and maintenance of contracts with exclusionary effect and discriminatory predatory pricing practices in the market for the supply of coal haulage by rail in the UK.¹⁸ The level of the fine reflected a 35% reduction for cooperation with the investigation, which also helped to conclude it.

2.6 Discriminatory pricing in relation to the supply of bulk mail delivery services was considered in the Ofcom decision of 14 August 2018. The case investigated discriminatory pricing in relation to the supply of bulk mail delivery services in the UK, involving Whistl, which was a bulk mail operator.¹⁹ Ofcom received a complaint from the company about changes that Royal Mail was making to its wholesale customers' contracts, including wholesale price increases it was introducing for certain letter delivery services. On 14 August 2018, Ofcom

¹⁸ ORR, case English Welsh and Scottish Railway Limited, 2004

¹⁹ Ofcom case CW/01122/01/14, 2014

announced that it had decided that Royal Mail infringed the Chapter II prohibition of the Competition Act and Article 102 of the TFEU by engaging in conduct that amounted to unlawful discrimination against postal operators competing with Royal Mail in delivery. Ofcom found that Royal Mail's planned price changes involved different price plans for wholesale customers, depending on whether they were able to hit mail volume targets for areas covering the whole of the UK. This meant that if a company wished to start delivering bulk mail itself in some parts of the country, as Whistl planned, it would have to pay Royal Mail around 0.25p more per letter than companies that used Royal Mail to deliver across the whole UK. Ofcom concluded that Royal Mail's notified price changes discriminated against its competitors in bulk mail delivery. It decided that Royal Mail used its position as a near-monopoly provider of delivery services to penalise any wholesale customer that sought to compete with it in bulk mail delivery. The company was fined GBP50m for the infringement. The Royal Mail appealed the decisions, and the appeal will be heard before the CAT in June and July 2019.

2.7 In 2005 Ofwat concluded an investigation,²⁰ without finding infringement in a case initiated by a complaint from Quantum Waste Management (QWM), that United Utilities (UU) had abused its dominant position in the market for the treatment of landfill leachate. QWM had alleged that UU, by the virtue of its pricing discrimination and by denying third-party access to its wastewater treatment works, abused its dominant position. Ofwat concluded that even though UU was likely to be dominant, there was insufficient evidence of abuse. Ofwat considered if UU's prices could have been excessive, discriminatory or predatory and it found the evidence of abusive pricing arising from this analysis was not sufficiently strong or compelling. The investigation also found no evidence of an exclusionary object or effect arising from UU's pricing policies. Finally, the claim that QWM had been excluded from access to the wastewater treatment sites was found to be unfounded.

2.8 On 15 March 2013 Ofwat launched an investigation into whether a water company's charges to self-lay operators breach the Chapter II prohibition of the Competition Act 1998.²¹ The charges under investigation related to the provision of new water mains for new development sites by a water company. During its investigation, Ofwat came to a preliminary view that Bristol Water holds a dominant position in the upstream market for the non-contestable supply and maintenance of water infrastructure in its area of appointment under the Water Industry Act 1991, and that conduct in this market potentially affected the downstream market for the provision of contestable services to provide new connections. Ofwat identified four specific competition

²⁰ Ofwat published decision rejecting complaint that United Utilities has abused its dominant position on 20 May 2005

²¹ Ofwat accepted commitments from Bristol Water on 23 May 2015

concerns related to Bristol Water's conduct, including pricing and other behaviours, that could potentially restrict entry and expansion of competitors in the provision of new water connections.

Bristol Water offered structural and behavioural commitments designed to recognise its own downstream services compete with downstream operators and that both are customers of Bristol Water's upstream services. The functional separation of Bristol Water's downstream services arm from its upstream services, alongside commitments to ensure equivalence in price and non-price terms for equivalent transactions was found to be appropriate to accept commitments in this case.

- 2.9 Rentokil a company which had 61% of the market and nearly 100% return on capital in pest control services, discriminated between its customers charging as much as 30% below or over its price list. Here, the Competition Commission imposed structural remedies, instead of price control, requiring the supplier to provide more information to its customers with the quotes. No fine was imposed in this case either.²²
- 2.10 In a case of alleged breach of Chapter II through a refusal to supply, In 2005 the OFT received a complaint from Karala alleging that NCR Corporation engaged in exclusionary conduct by discriminating against Karala by refusing to supply it with licences and other support on terms similar to those offered to other ATM software developers for the purpose of testing and developing application software on NCR's ATMs as well as that NCR had refused to supply KAL with the information necessary for development of software for NCR's ATMs. The OFT contacted the relevant market players with requests for information and conducted a review of the market outside the UK and reached the conclusion that it would have needed to undertake further work in order to reach a finding as to whether there was a breach of the Chapter II prohibition. The OFT subsequently decided to close the investigation on priority grounds and limited impact on consumers and competition.
- 2.11 On 16 February 2017, the CMA opened an investigation into Unilever pricing of single-wrapped impulse ice-cream. In its investigation, the CMA focused on offers of free ice-cream, which the retailers would receive on condition of buying a certain amount from the company, for a period of nearly four years. The CMA's concern was that this pricing behaviour had exclusivity rebates characteristics, incentivising the retailers to buy exclusively from the supplier. The approach followed closely that of Post Danmark II, before the landmark ECJ Intel judgment, evaluating all circumstances. The CMA found, contrary to a similar case in Italy also involving Unilever's ice-cream, that there was no infringement, despite Unilever presumed dominance with a market share above 50%. The CMA found that the offer was active only in the winter months, when the sales were much

²² MMC, case *Pest Control Services*. 302, 1988

lower and that the larger package offers applied without distinction to contestable and non-contestable products and that the offers amounted to less than 10% of Unilever sales during a period of 2016. The CMA decision did not indicate the use of an efficient competitor test, unlike in Italy but like in Italy, the CMA departed from a purely form-based approach, showing an effect-based approach in line with *Post Danmark II* and *Intel*.²³

2.12 There are also several examples of cases where there were serious grounds to suspect discrimination, but where the case did not proceed on priority grounds.

2.13 One such a case involved the London Metal Exchange.²⁴ In 2003 Spectron complained to the OFT about, among other issues, London Metal Exchange's (LME) electronic trading platform's pricing, which aimed at eliminating Spectron from the market by effectively creating a situation that Spectron did not have a margin on which to operate and the design of its fee structure may have contributed to any effect of the predatory operation of LME on Spectron's ability to compete effectively. The OFT also concluded that LME followed an anti-competitive, exclusionary strategy at least with regard to its intentions towards Spectron. The OFT announced it had reasonable grounds to suspect an infringement of competition law. The interim measure direction was issued but the OFT subsequently closed the investigation with an announcement that it was no longer its priority.

2.14 A starting secondary line discrimination case example is a stand-alone private action claim initiated in 2008. Enron Coal Services (ECS) filed a damages claim with the CAT²⁵ based around abusive discrimination stemming from selective discounts offered by EWS, which the CAT rejected. On 19 January 2011, the Court of Appeal dismissed ECS's appeal against that CAT judgment but it upheld ECS's claim that the CAT had erred in law and that contrary to the CAT's interpretation of the law, the CAT is bound by all findings of fact made by a competition regulator in the course of its investigation, ORR in this case. However, the Court of Appeal concluded that the CAT's judgment had not in fact been inconsistent with the ORR's decision and that the CAT had, therefore, been entitled to conclude that ECS had failed to establish that EWS's unlawful conduct had caused the loss that it claimed.

2.15 Secondary line discrimination was also alleged in a complaint to OFT in 2004 by JJ Burgess and Sons.²⁶ The OFT rejected the complaint by JJ Burgess and finding that Austin is unlikely to be dominant in the supply of crematoria services to funeral directors in the Hertfordshire area. The complainant alleged that the OFT erred

²³ CMA investigation into Single-wrapped impulse ice cream closed on 10 August 2017

²⁴ OFT issued an interim measures direction to the London Metal Exchange on 28 February 2006

²⁵ CAT, case 1106/5/7/08, *Enron Coal Services v English Welsh and Scottish Railway*

²⁶ CAT, case 1044/2/1/04, *JJ Burgess & Sons v OFT*

in defining the relevant geographic market, which resulted in no finding of dominance and that the refusal to supply was not abusive as there were many other crematoria.

The CAT has set aside the OFT's decision and found that the OFT committed errors of law and fact in its analysis of the relevant geographic market and the issue of abuse as well as making procedural errors. The CAT followed with its own decision finding that Austin had a dominant position which it abused, contrary to the Chapter II prohibition, by refusing JJ Burgess access to Harwood Park crematorium.

2.16 Pharma sector more generally has become a focus of enforcement activity in relation to unfair pricing.

Often several different pricing allegations or issues are present in any single case, as in Napp Pharmaceuticals investigated by the OFT, where allegations of price discrimination, excessive pricing and predatory pricing were all present.²⁷

2.17 In the Flynn Pharma case,²⁸ the CAT noted that pure unfair price cases are very rare in competition law and difficult to establish, suggesting that price controls are better left to sector regulators. The CAT allowed the possibility for competition law intervention in excessive pricing cases, provided this was done correctly, by establishing that the dominant undertaking reaps benefits that would not be possible under normal competition and that the price bears no resemblance to cost.

According to the CAT, which overturned the CMA decision fining Flynn, the two-limb test of unfair and excessive is the right one²⁹ but to apply it, the authority should use a range of possible analysis and take wider market analysis into consideration and not rely on a single theoretical model. In this case, the CMA used an abstract model of cost plus 6% and concluded that that the price, which was above this threshold, was excessive. Where the authority concludes, based on all its analysis that the price is excessive, then it must proceed to the next step and analyse if the price is unfair. The CAT, however, agreed with the CMA on the factors to use in the 'unfair' analysis, which can be: impact on the purchaser, increasing prices in the UK but not elsewhere, commercial purpose, et al.

2.18 The reason pharmaceutical sector is often the focus of excessive pricing cases may relate to the fact that demand in the sector is highly inelastic. When drugs' prices are not regulated or when they come out of a regulated price schedule and become unregulated, drug makers can easily raise the price, without worrying about the impact this may have on sales.

²⁷ OFT, case CA98/2D/2001

²⁸ CAT, cases 1274-1275-1276/1/12/17 *Flynn Pharma v CMA*

²⁹ ECJ, case 27/76, *United Brands v Commission of the European Communities*

- 2.19 There are other ongoing cases of excessive pricing in the UK. They include Actavis for Hydrocortisone pricing and Concordia for Liothyronine tablets.
- 2.20 A seminal case concerning discriminatory pricing was *Attheraces Limited v The British Horseracing Board (BHB)*.³⁰ In May 2004, Attheraces alleged that, following the judgment of the ECJ in *British Horseracing Board Ltd and others v William Hill* in which the ECJ found that BHB had no database rights in the information, BHB threatened to stop the pre-race data being supplied to Attheraces unless Attheraces entered into a direct data licence with BHB and paid arrears allegedly due in relation to its use of such data. This resulted in a claim in April 2005, alleging a threat to refuse to supply, which constituted abuse of dominant position. The alleged abuse constituted of threatening to stop supplying, tying of the provision of the pre-race data to the entry into a licence agreement directly with BHB that charged for intellectual property rights that did not exist, excessive pricing, and unilaterally imposing contract terms in order to put pressure on dependent customers to accept unfair, excessive and discriminatory terms.
- 2.21 Attheraces obtained an interim injunction from the High Court, which later found BHB to be dominant and that BHB had abused its dominant position by refusing to supply Attheraces with pre-race data on reasonable terms and had imposed unfairly excessive and discriminatory prices on Attheraces
- 2.22 Applying the test set out in the *Oscar Bronner* case that duplication of the facility would be extremely difficult and the data was essential to Attheraces' business, the Court decided that the provision of pre-race data was an essential facility and the terms of supply were unreasonable and unfair and amounted to an abusive refusal to supply. The prices were unfairly excessive when compared to the costs of production plus a reasonable return and that the prices were discriminatory when compared to the terms offered to other entities. The case was appealed to the Court of Appeal (CoA).
- 2.23 Interestingly, the CoA decided that BHP insistence on Attheraces to sign a license was a legitimate thing for BHB to do. The CoA decided there was no abuse and that the High Court failed to explain how it arrived at finding the abuse. Further, CoA ruled that the High Court had erred in deciding that prices that were above costs plus a reasonable rate of return were excessive as such calculations may be indicative of a competitive price, but that does not mean that prices above this level are not necessarily excessive, as other costs should be taken into account. In relation to arguments about discriminatory pricing, the Court of Appeal agreed with the High Court that the transactions that Attheraces argued had been subject to price discrimination were equivalent

³⁰ CAT, case1041/2/1/04, *Attheraces Limited v The British Horseracing Board*

transactions. However, the Court of Appeal did not consider that the High Court had demonstrated how the pricing had placed Attheraces at a competitive disadvantage as all customers were in the same position. The BHB pricing policy did not distort the competition between Attheraces and their competitors.

2.24 Personalised pricing was considered by the OFT as early as 2005, with a commission of report from RBB Economics on anti-competitive effects of selective pricing and rebates as well as their benefits.³¹ The report recommended that an effects-based approach should be used consistently to identify anti-competitive effects of discriminatory pricing, such as foreclosure effects as well as provide safe harbours, which would not lead to over intervention by competition authorities.

2.25 The CMA published guidance to online retailers on using pricing software, following its investigation into online posters sales, which states that repricing software can be used to encourage competition among retailers but where it's used to fix prices, it will be illegal. Furthermore, the CMA in its guidance says that software providers, if they help to facilitate any such illegal activity, risk breaching competition rules too.³² This was followed by the CMA publishing, in October 2018 an economic research paper describing in more detail how algorithms can be abused to facilitate illegal market behaviour.³³ In this paper, the CMA acknowledged benefits to consumers algorithms can provide, by giving consumers better information on which to base their choice but it also highlighted that the outcome of such algorithms can be higher prices.

2.26 A part of the online world that came under scrutiny in the recent years was online booking sector and, more broadly, where Most Favoured Nation (MFN) clauses are used. MFNs by their very nature discriminate. The first UK case in online hotel booking case relied on two competing retailers and a supplier limiting price competition (indirect RPM) and alleged infringement of Chapter I prohibition. The OFT accepted commitments, which were later quashed by the CAT and the case was sent back to the CMA, which subsequently closed the investigation on administrative priority grounds.³⁴ In 2016 the CMA announced that it is monitoring the situation in the sector with other NCAs.

2.27 On 6 April 2017, the EC with the CMA and other competition authorities published a joint report on this monitoring activity and found that , among others, the switch applied in the UK and some other countries to ban wide parity clauses and allow narrow MFNs coincided with increased in the level of hotel price differentiation

³¹ OFT *Selective price cuts and fidelity rebates*, Economic discussion paper, July 2005

³² CMA launches a campaign to warn online sellers about price-fixing <https://www.gov.uk/government/news/cma-warns-online-sellers-about-price-fixing>

³³ CMA, Pricing algorithms: Economic working paper on the use of algorithms to facilitate collusion and personalised pricing https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf

³⁴ The CMA closed the case in September 2015

between online travel agents, which indicated the hotels were taking advantage of the ban on wide MFNs but there was no evidence on the impact of commissions charged by those online travel agents to hotels.

- 2.28 MFNs are generally accepted to soften price competition. Their use by a dominant undertaking can lead to foreclosure.
- 2.29 In the CMA's motor insurance market investigation, the CMA found that MFN agreements between motor insurance companies and price comparison websites, there were competition issues. CMA concluded that wide MFNs soften price competition that is likely to have a negative impact on entry, innovation and commission fees, which in turn may result in higher premiums for consumers. The CMA imposed a ban on wide MFNs in this case.³⁵
- 2.30 Continuing with the online world, the OFT conducted three cases alleging Chapter I infringements into the behaviour related to online sales of mobility scooters.³⁶ The infringement in the case involving the Roma brand considered online sales ban across the UK. The second case, involving Pride mobility scooters, involved a ban on online advertising of prices below RRP. In the case involving TGA, in 2017, the company entered into an agreement with some of its retailers to limit online price competition. In the last case, immunity from fine was withdrawn from the company as the behaviour followed previous enforcement actions as well as the OFT informing the company in 2013 that this behaviour constituted infringement, highlighting the importance for the CMA of price competition and consumer choice, particularly in the online sector.
- 2.31 In another Chapter I case³⁷ and another one involving selective distribution system with an online sales ban element, Ping attempted to argue that its online sales ban policy was necessary and thus objectively justified to achieve a genuine commercial aim of promoting in-store custom fitting. The CAT found that Ping itself was selling online and allowed its retailers in the US to sell online, demonstrating that the online ban was not necessary to achieve its goal of custom-fitting.³⁸
- 2.32 In September 2018, the CMA settled a Chapter I case in which Heathrow Airport³⁹ in its lease to Arora imposed conditions on how to charge for the parking non-guests of Arora's Sofitel hotel, which restricted Arora's ability

³⁵ CMA notice of order issued on 18 March 2015

³⁶ OFT, Chapter I investigation into Roma Medical Aids and retailers in relation to mobility scooters, 2013, OFT Chapter I investigation into Pride Mobility Products and retailers in relation to mobility scooters (Case CE/9578-12), 2012 and CMA, cases Mobility scooters: anti-competitive practices, 2017

³⁷ CMA, case 50230, Sports equipment sector: anti-competitive practices, 2015

³⁸ 1279/1/12/17 Ping Europe Limited v Competition and Markets Authority before the Competition Appeal Tribunal

³⁹ CMA, case 50523, Conduct in the transport sector (facilities at airports), 2017

to compete with other car parks at the airport, which the CMA found to have infringed the competition rules.⁴⁰ Heathrow Airport was fined GBP1.6 million and Arora received full leniency.

- 2.33 OFT merger assessment guidelines, adopted by the CMA, stipulate that markets can be defined by customers paying different prices for the same product, where the supplier price-discriminates.⁴¹
- 2.34 In a merger involving two UK telecom companies, reviewed by the EC,⁴² where the CMA and Ofcom heavily contributed to the merger analysis, EU and UK authorities argued that the merged entity would discriminate against other users of the shared network infrastructure in the UK, or in other words their competitors. The merger was blocked, this being one of the three theories of harm, and is currently on appeal at the General Court.
- 2.35 In a recently blocked deal between Sainsbury's and Asda, increased buyer power was one of the issues identified by the CMA, which the agency alleged, could result in discriminatory behaviour towards supermarket suppliers.⁴³

3 Objective justifications to discriminatory practices

- 3.1 Refusal to supply was objectively justified in a case of Floe, a telecom company, which complained to Ofcom that Vodafone had infringed the Chapter II prohibition by disconnecting Vodafone SIM cards Floe acquired and thereby suspending Floe's GSM Gateway - a method of supplying cheaper mobile phone calls. In its rejection decision, Ofcom did not confirm a dominance by Vodafone but it found the conduct not to be abusive, as Floe conduct was illegal and therefore the disconnection was objectively justified.⁴⁴
- 3.2 Price discrimination is very common, and it can be very beneficial. It is sometimes necessary and objectively justified, particularly in situations of launching a new product or expanding to a different market segment. It also is necessary to achieve maximum contributions to fixed costs while supplying the broadest range of demand.
- 3.3 If there are consumers with inelastic demand, they can be charged more for the same product than those whose demand is more sensitive to price increases, therefore maximising total welfare. This practice, called "Ramsay pricing", is commonly used to discount public transport tickets to retired consumers or children.

⁴⁰ CMA, case Conduct in the transport sector (facilities at airports) (2017)

⁴¹ Merger Assessment Guidelines, Part 5(2)5(c)

⁴² EC, Case M.7612 – Hutchison 3G UK/ Telefonica UK

⁴³ UK merger investigation into the anticipated merger between J Sainsbury Plc and Asda Group (2018)

⁴⁴ CAT 18, *Floe Telecom Ltd v Office of Communications* [2004]

Although, some academics argue that price differentiation based on Ramsay's principles works only in the pharmaceutical sector.

- 3.4 An example of a case of price discrimination which found to be objectively justified, another one of primary discrimination allegations, was a case involving British Telecom (BT).⁴⁵ Here, several of BT's competitors complained to Oftel that BT pricing was anticompetitive. Oftel categorised the alleged abuse as a potential margin squeeze and looked whether BT would be profitable in the relevant downstream market if it had to pay the same prices as its competitors. Following price-cost analysis, there was evidence indicating potential margin squeeze. Oftel concluded, however, that there was no material adverse effect on competition and concluded that there was insufficient evidence to suggest that BT had intended to pursue an anti-competitive strategy. An allegation of price discrimination between retail customers was dismissed as Oftel found that there were objective cost justifications for the prices charged and the two groups of customers did not compete.
- 3.5 In a private action case, *Adidas-Salomon v Drape and Others*,⁴⁶ defendants argued that the alleged discrimination was objectively justified. The High Court granted Adidas an injunction, against alleged discrimination through changes made to the dress code for tennis tournament participants.
- 3.6 Following changes to the code, Adidas 'distinctive design element' was to be treated as a logo. Adidas' claim alleged that the decision to amend the dress codes put Adidas at a competitive disadvantage compared to other sports brands. Adidas argued that the International Tennis Federation had a dominant position in relation to the provision and promotion of premium international tennis tournaments and that the other defendants were collectively dominant on that market. According to the court, the key issue was whether the dress code was subject to the competition rules. If it was, then the defendants were acting as undertakings notwithstanding any other non-economic activities they may carry out. The Court considered that a restriction on on-court advertising through a dress code must be part of the economic activity of the tournament promoter and that Adidas' argument that the dress code was not excluded from the competition rules because of the exception for sports had a real prospect of success. Objective justification defence was raised by the defendants and stated that the dress code was applied in a non-discriminatory way, but the courts thought that Adidas had a real chance of succeeding to prove otherwise. The code was later amended, and the parties reached an agreement before the case reached trial.

⁴⁵ Oftel, case *BT UK-SPN calls service*, 2003

⁴⁶ High Court of England and Wales, case *Adidas-Salomon Ag v Drape & Ors*, (2006)

- 3.7 Following the CMA settling a case with Heathrow Airport, The Civil Aviation Authority (CAA) informed all the UK airports against operating in restrictive ways that may undermine competition rules.⁴⁷ CAA added that minimum price restrictions are unlikely to be justifiable.
- 3.8 In BskyB's pricing complaint,⁴⁸ the OFT concluded on 30 March 2004, that following a complaint by the Association of Licensed Multiple Retailers concerning BskyB's pricing of its premium channels for showing in licensed retail premises in the UK, the OFT launched an investigation into the possibility that BskyB was abusing its dominant position on the market for the supply of pay-TV channels with premium sport content. The alleged abuses concerned excessive pricing, price discrimination between commercial customers and between commercial and residential customers and the imposition of unfair contract terms on pubs and clubs in the UK.
- 3.9 The evidence may have been consistent with excessive pricing, but that was not a proof of abuse but rather, the OFT stated, was consistent with demand patterns, costs and profitability relating to the launch of a new product. In rejecting the claim of price discrimination, the OFT said that some price differences between different customers may be justified on the basis of differences in the cost of supplying them. The OFT also stated that, in the presence of very high common and fixed costs, as is this case, price discrimination can be justified on the basis that it increases output and enhances consumer welfare. The Association of Licensed Multiple Retailers produced no evidence that discrimination was used to exclude competitors nor of excessive pricing which is a necessary condition for establishing abusive price discrimination.

4 Objectives justifying prohibiting discriminatory practices

- 4.1 In 2017, a senior CMA official said competition authorities attempting to apply "fairness" as a quasi-theory of harm should define clear operational principles for doing so. Fairness was fine to use as an argument for as long as it was tied to a theory of harm⁴⁹.
- 4.2 As recently as July 2018, the FCA published research findings on price discrimination in financial services. In its paper, the FCA sets out how to balance consumer fairness of price discrimination and how to balance this with economic factors, such as maximising profits, at the same time stressing that each case needs to be analysed on its own facts.⁵⁰ The paper provides very useful insights into how the authority thinks about fairness. It distinguishes between procedural fairness – that is the firm's conduct vis a vis consumer and

⁴⁷ CAA open letter, published on 18 September 2018 <http://publicapps.caa.co.uk/docs/33/CAP171220180918.pdf>

⁴⁸ OFT case Association of Licensed Multiple Retailers: Price discrimination by BskyB, 2004

⁴⁹ UK CMA official says 'fairness' concept lacks clear principles – Chillin' Competition 2017, 25 October 2017 www.PaRR-Global.com

⁵⁰ Price discrimination in financial services How should we deal with questions of fairness?, FCA, Research Note; July 2018 https://www.fca.org.uk/publication/research/price_discrimination_in_financial_services.pdf

distributive fairness – the fairness of some consumers paying more than others. The FCA admits that it is used to focus more on the procedural fairness and the obligation to pay due regard to the “interests of consumers and treat them fairly”. This method has traditionally helped the FCA to pick up unacceptable behaviour. The note suggested that that traditional approach is shifting, and the distributive fairness was going to come more into focus. Where there is an economic case for intervention, it may be strengthened by concerns related to distributive fairness. The paper sets out the approach the FCA will take in its assessment, particularly where economic and distributive fairness do not align. The FCA will look at who is harmed, by how much, the volume of consumers harmed as well as the type of product, e.g. if it is essential?

4.3 The CMA followed the suit in November of 2018, with research into the practice of price discrimination by retailers.⁵¹ Generally, non-dominant firm is free to do this for as long as it does not set discounts or rebated with its competitors, which would constitute price-fixing. The CMA in its paper looked at the extent price discrimination prevents consumers from getting the best deals.

4.4 In a statement announcing commission of the CMA report, Business Secretary Greg Clark said:

“Ensuring markets work fairly and in the interests of consumers is a cornerstone of our modern Industrial Strategy, and I am proud to say that our consumer protection regime is among the strongest in the world.

(..) we are clear that companies should not be abusing this technology and customer data to treat consumers, particularly vulnerable ones, unfairly.”

4.5 The CMA announced that it was creating a new data unit in October 2018. It mentioned that, among others, the unit would deal with issues related to algorithmic fairness.

5 Relevance of other legal "areas" to apprehend discriminatory practices

5.1 *Unwired Planet International v Huawei Technologies*⁵² and others demonstrate how well private action where the main issues were related to intellectual property can handle discriminatory practices.

Unwired Planet holds a portfolio of patents related to telecommunications. Many of these patents have been declared essential to various telecommunications standards (SEPs). As such, the owner of the patents must make a declaration to the relevant standards body (ETSI) that it will licence the SEPs on fair, reasonable and non-discriminatory - FRAND terms. In March 2014, Unwired Planet brought proceedings for patent

⁵¹ Government and CMA to research targeting of consumers through personalised pricing
<https://www.gov.uk/government/news/government-and-cma-to-research-targeting-of-consumers-through-personalised-pricing>

⁵² High Court of England and Wales, 2014

infringement, in relation to five SEPs. Unwired Planet claimed that it has pursued negotiations to license the patents to the defendants on FRAND terms, but such negotiations have been unsuccessful. In the judgment on the non-technical issues, the High Court found that the terms offered by Unwired Planet were not FRAND. The High Court has determined the applicable FRAND terms for the licence to be offered by Unwired Planet to Huawei. Huawei claimed that Unwired Planet had breached Article 102 by bringing proceedings prematurely. It sought to rely on the ECJ judgment in *Huawei v ZTE*, which it claimed to set out the conditions with which a SEP owner must comply before starting an action seeking injunctive relief in order to avoid giving the defendant a defence under Article 102 of the TFEU. The High Court found that Huawei placed too narrow an interpretation on the ECJ judgment. Although Unwired Planet had not strictly met the specified conditions by making a FRAND offer prior to bringing proceedings, the High Court concluded that in the circumstances of this case the commencement of this action, including the claim for an injunction, was not an abuse of Unwired Planet's dominant position. The High Court also held that Unwired Planet had not abused its dominant position by unfair excessive pricing. Although the terms offered by Unwired Planet were higher than the FRAND terms determined by the High Court this was not to an extent that could be seen to be abusive. Further, The Court of Appeal dismissed Huawei's appeal from the decision of the High Court assessing a FRAND rate for a licence of SEPs under the ETSI rules.

In October 2018, the Court of Appeal dismissed all grounds of Huawei's appeal and also denied the company permission to appeal to the Supreme Court. In April 2019, the Supreme Court granted Huawei permission to appeal the October judgment.

5.2 In October 2018 the CMA launched enforcement action in the online hotel booking sector, on consumer protection grounds. On 6 February 2019, the CMA announced it received commitments from the site, which aimed to eliminate misleading information by September 2019. Though this sector has been investigated in recent times already using competition tools, the authority seems to be trying a different approach.

6 Future of the prohibition of discriminatory practices on a competition law perspective

6.1 Despite there being nine concurrent competition authorities, there have been three infringement decisions and five new cases opened, highlighting how difficult it may be for those authorities to bring competition cases in general. In my view, the authorities have already started changing their strategy and shift their focus to enforce their statutory duties through market studies and consumer protection powers instead.

- 6.2 On 6 December 2017, in a case concerning a partial ban on online sales in a selective distribution system, the ECJ ruled that undertakings compete on factors other than price, such as product sophistication or quality, which may justify a reduction in price competition and so such systems should be viewed and assessed in this light.⁵³ This ruling will possibly remain relevant in the UK beyond Brexit.
- 6.3 On 27 January 2015, the CMA has appointed researches to review the collection and commercial use of consumer data in three illustrative areas to gather information to further its understanding about the use of consumer data in the UK economy. In particular, it wanted to clarify the benefits resulting from the collection and use of consumer data and the potential for this to generate concerns, in terms of competition and consumer protection. The final report sets out that both firms and consumers can benefit from better targeting of offers and service improvements. However, the CMA notes that these benefits will only be realised if consumers are willing to provide data and firms use this data in transparent and competitive markets. The report examined possible competition issues such as barriers to entry, increasing market power from restricting access to data or leveraging, and price discrimination. The report found that the existing competition and markets tools are effective at tackling any conduct that gave rise to competition concerns in the markets for data protection and use. The concern areas were identified as the use of data, as well as concerns about the effectiveness of privacy policies, terms and conditions and cookie notices in enabling consumers to control the collection and use of their data. Some of these concerns may be addressed by changes in data protection regulation.
- 6.4 The CAT noted that pure unfair price cases are very rare in competition law and difficult to establish, suggesting that price controls are better left to sector regulators. See 2.17.
- 6.5 Where authorities suspect unfair practices, they may more often use market studies to address issues that may have a negative impact on competition, as they provide quite a lot of flexibility to authorities in terms of what they can say. Though recommendations like this are not binding, they can have a dramatic impact on markets. One such a recent example was ORR's recent market study into ticket gates and ticket machines.⁵⁴
- 6.6 The authorities in the UK seem to be confident that the tools they have at their disposal are sufficient to deal with discriminatory practices. Although, at the same time, they propose changes to 'optimise' the system. One

⁵³ ECJ, case C-230/16, Request for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Frankfurt am Main in the proceedings *Coty Germany GmbH v Parfümerie Akzente GmbH*

⁵⁴ Market Study into the supply of automatic ticket gates and ticket vending machines, Final report 13 March 2019

area where this may change is merger control as there are currently several proposals to change the current regime.

- 6.7 Authorities will continue to focus on the digital economy, to make sure the markets deliver a fair outcome to consumers, increasingly using its consumer protection powers.
- 6.8 Recently concluded Furman report suggests a number of recommendations for light-touch regulation of the sector with a voluntary code of conduct, akin to the one in the grocery sector.⁵⁵
- 6.9 UK leaving the EU will bring challenges but also opportunities to diverge the practice from that of the European authorities, where it may be appropriate.
- 6.10 UK competition authority, as many others do right now, increasingly finds it needs to act quickly to remedy situations or discriminations in the digital world. Although these situations affect consumers as much as competitors, the UK CMA increasingly wants to use its current consumer protection powers to be able to act faster and protect consumers.
- 6.11 The CMA has gone as far as to propose a raft of changes to the UK regime, so that it can use more consumer protection powers, i.e. to amend legislation to include it, so that the authority has grounds for action to remedy a situation, where currently it would only be able to do it to “protect competition for the benefit of consumers”.⁵⁶ Here, it seems, the authority wants to stretch the types of behaviour prohibited by competition law, to other areas. This may be a beginning of a trend to expand competition enforcement, including in relation to issues such as discrimination, by looking at consumer issues through the lens of competition to fix market distortions and market failures.

⁵⁵ Unlocking digital competition, Report of the Digital Competition Expert Panel
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

⁵⁶ CMA's statutory duty

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VIII. List of abbreviations

Abbreviation	Full name
AEC	adverse effect on competition
CA98	Competition Act 1998
CAA	Civil Aviation Authority
CAT	Competition Appeal Tribunal
CLA	Competition Law Association
CMA	Competition and Markets Authority
CoA	Court of Appeal
EA02	Enterprise Act 2002
ERRA	Enterprise and Regulatory Reform Act 2013
EU	European Union
FCA	Financial Conduct Authority
MFN	Most Favoured Nation
NCA	National Competition Authority
NIAUR	Northern Ireland Authority for Utility Regulation
Ofcom	Office of Communications
Ofgem	Gas and Electricity Markets Authority
OFT	Office of Fair Trading
Ofwat	Water Services Regulation Authority
ORR	Office of Rail and Road
PSR	Payment Systems Regulator
SEP	Standard Essential Patent
TFEU	Treaty of Functioning of the European Union
UK	United Kingdom