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UK COMPETITION DISPUTES 2024 YEAR IN REVIEW

2024 has been a year brimming with important developments in the competition disputes sphere. The year has seen key decisions and regulatory developments impacting the CMA's regulatory powers, and landmark UK judgments on the approach to calculating damages in competition claims. Additional developments in the enforcement of competition law in digital markets, sports, and the pharmaceutical sector have further shaped the regulatory landscape.

In this newsletter, we present an overview of these developments, which are expected to shape the upcoming year.

CMA INVESTIGATORY POWERS BOLSTERED

This year saw important developments in respect of the CMA's powers of investigation. While a Court of Appeal judgment found that the CMA's information gathering powers had extraterritorial reach, the High Court underlined the CMA's ability to obtain domestic search warrants.

Court of Appeal judgment in Volkswagen on extraterritorial powers of the CMA

In January 2024, the Court of Appeal confirmed in *CMA v Volkswagen*[1] that the CMA's power to require the production of documents has extraterritorial effect. The CMA issued notices under its legislative powers seeking the production of documents relevant to an investigation against both the German parent and UK subsidiaries of two car makers. The parent companies refused to

[1] *R (on the application of Volkswagen) v Competition and Markets Authority* [2023] EWCA Civ 1506.

produce documents held outside the UK and challenged the resulting CMA fine for failure to comply.

At first instance, the Competition Appeal Tribunal ("Tribunal") held that the notices were ineffective, relying on the presumption against extraterritoriality. However, the Court of Appeal held that the notices did have extraterritorial effect, finding that there was no territorial limitation in the wording of the legislation which empowered the CMA to require "any person" to produce documents. The Court reasoned that, if the CMA's powers were limited territorially, it would create a perverse incentive for cartelists to move their activities offshore, even as their conduct remained targeted at the UK.

The Supreme Court has granted permission to appeal.

High Court judgment in SIKA on CMA power to conduct domestic searches

In April 2024, the CMA successfully appealed a Tribunal decision which had rejected an application for a warrant to search domestic premises.[2] The CMA had suspected the existence of a cartel and applied for warrants to search the business and domestic premises of a number of individuals. While the Tribunal granted the warrants in respect of the business premises, as there were reasonable grounds for suspecting that the documents would be concealed or destroyed, it refused to issue the warrants to enter the domestic premises. The Tribunal reasoned that the inference which supported the warrants for business premises was not sufficient in the case of domestic premises, and that something more was required, such as evidence of a "propensity to destroy" evidence.

This reasoning was rejected by the High Court, which held each case will depend on its particular facts and circumstances, and that there was no general rule that something more was required to establish grounds for a domestic warrant.

Expansion of investigatory powers under the Digital Markets, Competition and Consumers Act 2024 ("DMCC")

The DMCC, which was passed by Parliament in May 2024, further enhances the CMA's investigatory powers. It explicitly provides for the extraterritorial reach of the CMA's information gathering powers and furnishes the CMA with new powers to use equipment found on the premises the subject of a search warrant to search records and documents stored elsewhere.

There now also exists a duty of document preservation where a party knows or suspects that a competition investigation is likely to be carried out. The DMCC will enter into force on 1 January 2025.

[2] *R (on the application of the CMA) v The Competition Appeal Tribunal* [2024] EWHC 904 (Admin).

UK DAMAGES JUDGMENTS

Court of Appeal considers damages and pass-on in Royal Mail v DAF

A significant judgment handed down in 2024 concerned DAF's appeal against the Tribunal's 2023 damages judgment, which was the first case to go to trial in the UK further to the 2016 Trucks decision of the European Commission (the "Commission").

In its judgment of February 2024,[3] the Court of Appeal upheld the Tribunal's assessment of damages, endorsing the "broad axe" approach. Having chosen not to lead evidence about the internal workings of the cartel, DAF's argument that it had not achieved higher prices through the operation of the cartel than it otherwise would have could be disregarded; the Tribunal was entitled to infer that they participated in the cartel for so long because they gained a significant financial benefit from being part of it.

In relation to customer pass-on, the Court of Appeal affirmed that it was for DAF to prove that the overcharge was passed on to the claimant's customers and that, in order to do so, it would need to establish that there was a "direct and causative link" between the overcharge and the prices charged to customers, and endorsed the four non-exhaustive factors considered by the Tribunal, namely:

1. The claimants' knowledge of the overcharge or the specific increase in cost;
2. The relative size of the overcharge against the claimants' overall costs and revenue;
3. The relationship between the product on which the overcharge is incurred and the product the claimants sold to customers; and
4. Whether there are any identifiable claims by purchasers from the claimants in respect of losses caused by the overcharge.

High Court in Granville Technology Group Ltd v Chungwha Picture Tubes

Damages and pass-on were also considered by the High Court in *Granville*,[4] which concerned a claim for follow-on damages from a decision of the Commission which found a cartel in relation to the market for LCD Panels.

In relation to pass-on, the court recognised that whether there had been any downstream pass-on to customers was a question of fact to be proved by the defendants. The court accepted that, given the lack of evidence, expert evidence could inform this question, but rejected the contention that it was sufficient if the defendants established merely a plausible factual foundation for pass-on.

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[3] *Royal Mail Group Ltd v DAF Trucks Ltd & Ors* [2024] EWCA Civ 181.

[4] *Granville Technology Group Ltd v Chunghwa Picture Tubes Ltd & Ors* [2024] EWHC 13 (Comm).

TRUCKS CARTEL

UK Litigation

Further to the Tribunal's 2023 judgment in *Royal Mail*, discussed above, the remaining first wave of Trucks cases were to have proceeded to trial in 2024 but Hausfeld achieved settlements for all of its first wave clients, avoiding the need for a trial.

A second wave of Trucks cases involving several hundred claimants is scheduled for trial in 2026. To avoid the delays inherent in the use of sequential trials as used in the first wave, the Tribunal has adopted an "issues-based" approach for the second wave, focusing on overcharge, value of commerce and pass-on, with the parties being directed to exchange expert-led positive cases setting out their position on each of the issues together with all of the evidence relied upon. To facilitate this, the parties have been required to engage constructively, through their experts, to exchange information through data requests and depositions if necessary.

Dutch Litigation

Last year, the Amsterdam District Court issued an interim judgment in the second wave of proceedings, referring a number of preliminary questions on the topic of applicable law to the Dutch supreme court. The answers to these questions will be crucial for all mass litigations resulting from pan-European cartels and will trailblaze the application of Rome II Regulation in private enforcement. On 5 April 2024, Advocate General Vlas issued his opinion, siding with the claimants' position. A decision from the Supreme Court is expected in early 2025.

AUTO PARTS CARTELS – OCCUPANT SAFETY SYSTEMS

Court of Appeal vindicates use of joint expert evidence

In June 2024, the Court of Appeal delivered its judgment in Autoliv *AB*, upholding a 2023 ruling by the Tribunal that required the defendants in a cartel damages claim to instruct a single joint economic expert on the issues of overcharge, pass-on and financing losses.[5]

The Court of Appeal held that even the existence of a material conflict of interest between the defendant parties was no "*trump card*", since the civil procedural rules also allow for the appointment of a single joint expert in situations where there is a manifest conflict of interest, such as in property valuation disputes. It affirmed that the principles applicable to single joint experts are no different from the conventional case management approach of dealing with cases *"justly at a proportionate cost, conditioned only but importantly by the duty to restrict expert evidence to that reasonably required to resolve the dispute.*"

[5] *PSA Automobiles SA v Autoliv AB* [2024] EWCA Civ 609.

The judgment rebuts the notion that separate expert testimony is a default right and places the onus on defendants to demonstrate the necessity for multiple individual experts. It thereby sets a crucial precedent that may streamline future competition law cases, potentially reducing litigation costs and procedural delays. A summary of this judgment is set out in our Perspectives.

DIGITAL MARKETS REGULATION AND ENFORCEMENT

The EU Digital Markets Act ("DMA") and UK DMCC

Following the Commission's initial gatekeeper designations in 2023, additional gatekeeper designations were issued in 2024 in respect of Apple's iPadOS operating system and Booking's online intermediation service. In July 2024, the EU General Court dismissed an action brought by ByteDance in respect of its gatekeeper designation.

Following designation, the first set of gatekeepers had six months – until 7 March 2024 – to ensure compliance with the obligations imposed under the DMA. On 25 March 2024, the Commission launched five non-compliance probes against Apple, Alphabet (Google) and Meta. As at the time of writing, this six-month period has only just expired in respect of the iPadOS and Booking.com gatekeeper designations.

The UK's own digital markets regime received parliamentary approval in May 2023 and, further to commencement regulations published in November 2024, will enter into force on 1 January 2025.

Foundem v Google and the CJEU judgment in Google Shopping

On 10 September 2024, the CJEU rejected Google's appeal in Case C-48/22 *Google Shopping*, in respect of the Commission's finding that Google had abused its dominant position as a search engine by favouring its own comparison shopping service ("CSS") over rival CSSs.

Google had argued that the General Court had erred by not applying the test in *Bronner* to what it characterised as a question of access to Google's infrastructure in the form of its shopping boxes. This would have set a high bar for a finding of infringement. The CJEU held that the *Bronner* test did not apply, as the issue was not one of refusing access to a facility, since CSSs already had access to Google's general search results. Rather, the issue was one of access granted on *discriminatory terms*. The CJEU also noted that the "as efficient competitor" test was not always relevant to abuse of dominance, in particular where the abusive conduct included exclusionary measures.

The CJEU also rejected Google's argument that, having found that the discriminatory conditions in question amounted to the combination of two practices – the more favourable positioning of Google's own results and the simultaneous demotion of rival CSSs – it was sufficient to remove only one of them. The CJEU held that the appropriate counterfactual requires removing *both* aspects of the abuse.

Separately but related, 2024 also saw a major shake-up to the UK Google Shopping proceedings, with the Tribunal ordering joint case management of the Foundem claim (which we have previously written about here and here) and actions brought by three other CSS claimants, Kelkoo, Ciao and Connexity. The four claims are to be managed together ahead of a single split trial on liability issues in June 2026.

CJEU Booking.com judgment on price parity clauses

On 19 September 2024, the CJEU issued a preliminary ruling on whether price parity clauses used by the online hotel booking platform Booking.com were ancillary restraints, such that they fell outside the prohibition in Art 101(1) TFEU.

In Case C-264/23 the CJEU held that, to be an ancillary restraint and therefore fall outside the scope of Art 101(1), the restraint must be objectively necessary to the main operation or activity and proportionate to the objectives of that main activity. The CJEU held that this is a high bar; it must be impossible to implement the main activity in the absence of the ancillary restraint. The CJEU considered that the broad price parity clauses were neither objectively justified, nor proportionate, and were likely to have an appreciable effect of competition. Although the narrow price parity clauses were less problematic, the CJEU similarly found that they were not objectively justified.

Public enforcement action

2024 also saw the Commission and the CMA progress its investigations in respect of competition law infringements by Big Tech companies.

In March 2024, the Commission handed down a decision finding that Apple had infringed competition law by prohibiting developers of iOS music streaming apps from informing users of cheaper ways to subscribe to, or buy, content for apps distributed through Apple's App Store. The decision, discussed in detail in our Perspectives, found that Apple's 'anti-steering' restrictions amounted to unfair trading conditions and an abuse of Apple's dominant position under EU competition law and may have led to consumers paying more for music subscriptions than they otherwise would have. The Commission issued Apple a €1.84 billion fine.

In June 2024, the Commission announced that it had sent a statement of objections to Microsoft setting out its preliminary view that Microsoft had abused a dominant position by tying Microsoft Teams to its suite of productivity applications Office 365 and Microsoft 365.

In September 2024, the CMA issued a statement of objections to Google, provisionally finding that Google had abused its dominant positions in the digital advertising technology sector by preferencing its own services, disadvantaging competitors and preventing them from competing on a level playing field to provide publishers and advertisers with more competitive services.

In November 2024, the Commission fined Meta €797.72 million in respect of abusive practices benefitting its Facebook Marketplace. The decision found that Meta abused dominant positions by tying its online classified ads service, Facebook Marketplace, to its social network, and by imposing unfair trading conditions on other online classified ads service providers.

In tandem with the public and private enforcement of competition law in respect of Big Tech in the UK, it is expected that the CMA will also commence regulatory action in the sector once its new powers under the DMCC enter into force in January 2025. The CMA has noted that it expects to launch 3-4 investigations in the first year of the new regime's operation, with digital advertising, search and mobile ecosystems being high priorities for the regulator.

ANTITRUST AND AI

The year has also seen a crystallisation of competition concerns in respect of AI.

In the UK, following a 2023 white paper on AI regulation directing regulators to provide updates on their strategic approaches, regulators including the CMA reported back with concerns about the potential for AI to cause anti-competitive harm unless certain frameworks are put in place.

The Commission similarly identified a number of potential anticompetitive harms that may materialise in markets for generative AI in a September 2024 Competition Policy Brief, signalling its pro-active assessment of the sector which may translate into enforcement action in 2025.

On 23 July 2024, the Commission, CMA, the US Department of Justice and Federal Trade Commission released a Joint Statement on competition in generative AI and AI products. The statement noted the need for regulatory vigilance, identified a number of risks to competition posed by the emerging technology, and set out common principles for protecting competition in the AI ecosystem.

Antitrust and sports

The past year also proved to be an active one for competition enforcement in the sports ecosystem, with landmark EU judgments in respect of the power of sports governing bodies to exclude competitor organisations and the FIFA transfer regulations. In the UK, the field also saw a resurgence of actions related to replica football kits.

Sports Governance

European Super League and International Skating Union

In Case C-333/21*European Super League* and Case C-124/21 *International Skating Union*, The CJEU found that the discretionary power held by dominant sports governing bodies to exclude competitor organisations from the market infringed EU competition law. It held that prior-authorisation conditions imposed by governing bodies must be subject to a framework which allows those rules to be exercised in a transparent, objective, non-discriminatory and proportionate manner. Sanctions for breaches must also be justified and proportionate.

While these decisions have been interpreted as a watershed for increased competition in sports governance, the decisions also set out a clear path for incumbent sports organisations to bring their houses in order by redrafting their rules into a compliant framework.

Football Governance Bill

In the UK, the Football Governance Bill 2024 currently before Parliament would establish an Independent Football Regulator for England whose decisions will be appealable to the Tribunal.

Football Transfer Regulations

In Case C-650/22 *Fifa v BZ*, the CJEU heard a challenge to FIFA's transfer regulations which provided for a raft of onerous financial and sporting sanctions on both the player and their new club when a player left their contract without just cause.

On a challenge from footballer Lassana Diarra, who had left his previous club FC Lokomotiv Moscow under a cloud, the CJEU found that competition law and the EU principle of freedom of movement rendered the transfer regulations unlawful. It found that the legal, sporting and financial risks imposed on clubs wishing to employ a player acted as a real impediment to the free movement of those players and went beyond what was necessary to pursue the objectives of ensuring stability and continuity in player rosters and contracts. The transfer rules were also held to have as their object the restriction and prevention of cross-border competition between football clubs. While it left consideration of whether an exemption might apply to the referring Belgian court, the CJEU noted that a significant number of the rules were discretionary or disproportionate in nature, which would appear to preclude a determination that they were indispensable or necessary in order to achieve efficiency gains.

PHARMACEUTICAL CASES

2024 proved to be another active year for jurisprudence in respect of the pharmaceutical industry, followAing last year's Tribunal hearings in respect of the CMA's infringement decisions in *Hydrocortisone*, *Prochlorperazine*, and *Phenytoin* (for a quick overview, see our 2023 Year in Review).

Hydrocortisone

In *Hydrocortisone*,[6] the Court of Appeal considered a complicated series of Tribunal rulings following an appeal from the CMA's decision that certain agreements in respect of the supply of Hydrocortisone tablets constituted an anti-competitive market sharing agreement. Having in a first judgment upheld the CMA's decision, the Tribunal, pursuant to a further hearing on the point, considered that the CMA had failed to observe due process by not fully putting its case on the market sharing agreement to one of the witnesses in cross-examination. The Tribunal accordingly overturned its initial findings and held that the market sharing agreement aspects of the CMA's decision must be set aside.

[6] *Allergan Plc & Ors v CMA* [2024] EWCA Civ 1023.

The Court of Appeal concluded that the Tribunal had fallen into error by holding a further hearing on the due process point. Rather, the Tribunal should have issued a judgment based on the evidence that it had heard. On the substantive issues, the Court of Appeal considered that the CMA's case had been properly put to the witnesses.

Prochlorperazine

In May 2024, the Tribunal allowed appeals in respect of the CMA decision in *Prochlorperazine*.[7] The infringement decision concerned anti-competitive practices between 2013-2018 in the supply of anti-nausea drug Prochlorperazine and found that there was an agreement under which a competitor was paid not to enter the market. Upholding the appeals, the Tribunal was persuaded that the CMA had erred in its assessment of the factual evidence and that the evidence did not demonstrate on the balance of probabilities the existence of an anti-competitive agreement to exclude competition from entering the market.

Phenytoin

Rounding off the year's trifecta of pharmaceutical judgments, on 20 November 2024 the Tribunal handed down judgment in relation to challenges by Pfizer and Flynn to the CMA's decision in the *Phenytoin* case, which found that Pfizer and Flynn had abused positions of dominance in the market for phenytoin sodium capsules by charging unfairly high prices.[8]

The CMA's decision was a remittal decision, made following earlier rulings on appeal by the Tribunal in 2018[9] and the Court of Appeal in 2020.[10] In this appeal, the Tribunal found that the CMA had again erred in its approach to excessive and unfair pricing, finding that it had in many respects worked backwards from a conclusion that Pfizer and Flynn had colluded – a finding which the CMA had not actually reached in its decision. This in turn led it to disregard Flynn's costs of acquiring capsules, which undermined its approach to examining whether the pricing was excessive or unfair. The Tribunal also criticised the CMA's approach to producer surplus, finding that it had at times conflated its assessment of the "excessive" and "unfair" limbs.

Notwithstanding these errors, the Tribunal held that it had jurisdiction to remake the decision itself, and found that all infringements alleged against Flynn were made out, and that three of the four infringements alleged against Pfizer were made out.

Public enforcement action

On 13 July, the Commission issued a Statement of Objections to Alchem in relation to its participation in a cartel for N-Butylbromide Scopalomine/Hyoscine – or SNBB – a drug used to treat motion sickness and nausea. Previously, the Commission had issued a settlement decision in respect of a cartel involving several producers of SNBB. Alchem had been part of that investigation but chose not to participate in the settlement.

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[7] *Alliance Pharmaceuticals & Others v Competition and Markets Authority* [2024] CAT 36.
[8] *Flynn and Pfizer v Competition and Markets Authority* [2024] CAT 65.
[9] *Flynn and Pfizer v Competition and Markets Authority* [2018] CAT 11.
[10] *CMA v Flynn Pharma Ltd and others* [2020] EWCA Civ 339.

Following the commencement of its investigation in 2022, in July 2024 the Commission accepted binding commitments from Vifor Pharma in relation to alleged disparagement of a competing intravenous iron treatment produced by Pharmacosmos, thereby potentially restricting competition from entering the market. Vifor agreed to undertake a series of remedial measures as well as to introduce safeguards to ensure future compliance with competition law. On 10 December 2024, the CMA initiated a public consultation in respect of commitments offered by Vifor Pharma to address the CMA's concerns regarding Vifor's potentially misleading claims. The commitments include a payment of £23 million to the NHS.

On 31 October 2024, the Commission imposed a fine of €462.6 million on Teva for disparagement and misuse of European patent procedures to delay entry to the market of rivals to its multiple sclerosis medicine, Copaxone.

COLLECTIVE REDRESS

In what proved to be another active year for collective enforcement of competition law, our team has prepared a dedicated 'Year in Review' in which they discuss key trends and cases in this area.

LOOKING AHEAD

With enforcement under the DMA now in full swing, and the DMCC entering into force from January 2025, the coming year will be marked by more enforcement action in the digital sector. In the EU, this will be bolstered by the seminal CJEU judgments issued this year, while in the UK public enforcement in the sector will continue to benefit from developments in the sphere of collective and private enforcement. We are also likely to see public and private enforcement activity in sectors beyond digital markets, such as in respect of areas familiar to competition lawyers: trucks, auto parts, financial services, and pharmaceuticals products. Competition law may also find its way into areas less frequently explored, such as in the sports sphere and in respect of labour market law, as well as rapidly developing new areas such as artificial intelligence.

If you would like to discuss anything in this newsletter, please contact Scott Campbell, Head of Competition Disputes, or your usual Hausfeld contact.

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