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FOR THE CHALLENGE

UK COMPETITION DISPUTES 2023 YEAR IN REVIEW

2023 has been an eventful year in the competition disputes sphere, with judicial guidance offered in relation to a number of significant areas of the law and in respect of case management. In this newsletter, we recap on those noteworthy developments and highlight the cases and legislation that are poised to shape the legal landscape in the coming year.

UK PHARMACEUTICAL INFRINGEMENT DECISIONS IN THE APPEAL SPOTLIGHT

2023 was an active year for appeals of public enforcement decisions, and the pharmaceutical industry continues to be one where breaches of competition law are not at all infrequent. In 2021 and 2022, the CMA issued four antitrust infringement decisions in the pharmaceutical industry (*Hydrocortisone*, *Liothyronine*, *Prochlorperazine*, and *Phenytoin* – for a quick recap, see our 2022 Year in Review).

All four decisions were appealed to the Competition Appeal Tribunal and have either been heard by the Tribunal or had judgments handed down this year.

Judgment on Liothyronine infringement decision

In August 2023, the Tribunal handed down its judgment upholding the CMA's decision to fine Advanz Pharma and the two former owners of the Advanz business, HgCapital and Cinven, for abusing its dominant position in the UK market in relation to the supply of liothyronine tablets (an essential medicine to treat thyroid hormone deficiency). The CMA found that Advanz had charged excessive and unfair prices from 2009 to 2017. The Tribunal concluded that the CMA's cost-plus methodology was sound, and the relevant prices were both excessive and unfair – although some penalties imposed by the CMA were reduced by the Tribunal. On 16 November 2023, the Tribunal granted HgCapital and Cinven's applications to appeal the ruling on penalty and rejected Cinven and Advanz's applications to appeal the findings on liability.

Judgment on Hydrocortisone infringement decision

Five weeks after ruling on the Liothyronine infringement decision appeal, the Tribunal dismissed another appeal against the CMA's findings from July 2021 of abusive conduct with respect to hydrocortisone tablets (a steroid medicine). This case relates to findings of excessive pricing and abuse of dominance by Auden Mckenzie and Actavis UK between 2008 and 2018, including exploiting the fact that de-branded drugs are not subject to NHS price regulations. They were found to be responsible for rising prices of their 10mg and 20mg hydrocortisone tablets by over 10,000%. The Tribunal upheld the CMA's findings on liability throughout the relevant period but reduced the CMA's fine in respect of Actavis UK's former parent Allergan. The total fine – almost £130 million – is the highest ever CMA penalty upheld by the Tribunal.

Hearing on Prochlorperazine infringement decision

From June to August this year, the Tribunal heard the appeals by Alliance, Advanz, Cinven and Lexon against the CMA's infringement decision regarding anti-competitive practices between 2013-2018 in the supply of Prochlorperazine 3mg buccal tablets in the UK. Prochlorperazine is an important drug used to treat nausea, dizziness and migraines. The CMA's decision found there was an agreement under which a competitor was paid not to enter the market and the CMA issued fines of over £35 million in the infringement decision.

The CMA also issued director disqualification proceedings in the High Court against seven directors in connection with its infringement decision. In October 2022, the High Court made an order transferring the competition law issue (this is, whether the directors' companies committed a breach of competition law) to the Tribunal. This was heard alongside the aforementioned appeals, and the progress of the disqualification case in the High Court is pending the Tribunal's decision.

A judgement from the Tribunal is expected in the new year.

The return of Phenytoin to the Tribunal

Rounding off the Tribunal's year of hearing pharmaceutical related appeals, November marked the start of the trial hearing for the challenges by Pfizer and Flynn to the CMA's remitted decision in the Phenytoin case. This is a case with a long history: the CMA first found in 2017 that the two pharmaceuticals abused their dominant position, resulting in NHS's costs for phenytoin sodium capsules (anti-epilepsy medicine) increasing from £2 million to £50 million in a single year.

In June 2018, the Tribunal upheld the CMA's findings on dominance and market definition but referred the decision back to the CMA on the basis it had not determined the correct economic value of the drug, it had not sufficiently proven excessive pricing and had failed to consider competitors' prices. On appeal, the Court of Appeal clarified the legal test on excessive pricing and upheld parts of the CMA's appeal, but ultimately found that the CMA should reconsider its findings on abuse and penalties. In parallel, the Tribunal had ordered the CMA to pay some of Flynn and Pfizer's costs of the appeal, a decision which the CMA appealed. This has generated some significant costs rulings, including a Supreme Court decision that held that public authorities (particularly the CMA) could not automatically rely on *Bradford Metropolitan District Council v Booth*. *Booth* had held that an order for costs should not be made against a public body, even where such a body was an unsuccessful defendant in proceedings relating to the exercise of statutory functions, as long as the public body had acted reasonably.

Regarding the remitted infringement decision, the CMA again found breaches on the part of Pfizer and Flynn, with appeals being heard by the Tribunal at the end of 2023.

TRUCKS CARTEL: A SECOND WAVE RISES IN THE UK

A case with a noteworthy decision from the Tribunal this year is the renowned Trucks cartel claim, which started the year with a judgment in the first trial of the UK claim. The Tribunal found that the claimants had suffered a 5% overcharge. The year ended with developments in the second wave of UK proceedings, which have been largely stayed for the last year or so. A case management conference in October 2023 attempted to grapple with the issue of how to manage claims on behalf of over 80 claimants across multiple countries and who operate at different levels of the supply chain. An approach that would seek to deal with all the issues at a single trial will be debated further at a case management conference in December 2023. A trial is proposed to take place towards the end of 2025 or the beginning of 2026.

Hausfeld has represented 14 corporate groups in claims before the UK's Competition Appeal Tribunal for damages resulting from the Trucks cartel.

TRUCKS CARTEL: DEVELOPMENTS IN DUTCH LITIGATION

In the Netherlands, most claimants assigned their claims to two Dutch SPVs, represented by Hausfeld. These SPVs channel the claims of more claimants and more trucks than any other similar stakeholder in the Netherlands. Hausfeld progressed the Trucks mass litigation before the Amsterdam District Court, which is case managed in separate 'waves' of proceedings.

On 13 September 2023, the Amsterdam District Court issued an interim judgment in the second wave of proceedings on the topic of applicable law. In July 2022, it had issued an interim judgement in the first wave of proceedings finding that Dutch law was to apply to all claims. However, the Court took a different approach for the second wave of proceedings. The Court considered it best to definitively resolve this strategic topic as early as possible in the litigation by asking preliminary questions to the Dutch Supreme Court, instead of leaving it to potentially be decided on appeal. On 8 November 2023, after having received input from the parties, the Court issued a further judgment specifying the exact formulation of these preliminary questions.

Further developments on this important issue before the Dutch Supreme Court are expected in 2024. Hausfeld represents in total more than 4,500 companies from 37 countries before the Dutch courts.

AUTO PARTS CARTELS – OCCUPANT SAFETY SYSTEMS

This past year has seen notable developments in *PSA Automobiles and Others v Autoliv and others*, a cartel damages action before the Competition Appeal Tribunal scheduled for trial in October 2024. The case is now under a year from trial.

First time defendants required to instruct single joint economic expert.

After a case management conference in March 2023, the Tribunal ordered all Defendants to instruct and rely on a single joint expert in the field of competition economics. All but one of the Defendants applied for this order to be varied, so that all Defendants could instruct their own expert. In November, the Tribunal issued a groundbreaking ruling rejecting the Defendants' applications. The Tribunal held that there is no presumption that defendants should be able to rely on their own experts, and that, rather than this creating a conflict of interests, justice would be best served by having a shared economic expert for the Defendants. A full summary, and our view on the impact of this judgment, is set out in our Perspectives. In short however, and despite multiple prior attempts by claimants in other cases, this judgment is the first cartel damages claim in which the Tribunal has ordered Defendants to rely on the evidence of a single, joint economic expert.

FOUNDEM V GOOGLE

Infederation Ltd (Foundem), a UK based technology company that operated a vertical search service allowing consumers to compare prices for goods and services offered on retailer websites, was the first company to bring Google's anti-competitive self-preferencing conduct to the attention of the European Commission and the US Federal Trade Commission.

You may recall that in June 2017, the European Commission issued the *Google Shopping* decision and fined Google €2.4 billion for abusing its dominant position as a search engine by favouring its own comparison shopping service (CSS) over competing CSSs. The decision was appealed by Google to the General Court, and the Hausfeld team intervened in the appeal on behalf of Foundem, in support of the Commission. Foundem's intervention was key to the General Court's 2021 judgment, which largely upheld the Commission's Decision. We have previously written about *Foundem v Google* [here] and [here].

2023 has been an important year for Foundem in the UK and Europe. In March 2023, at the sixth case management conference (CMC) in its private action for damages before the UK courts, Foundem obtained further disclosure from Google in the form of categories of documents as well as witness statements. These witness statements pertain to a number of crucial issues in the proceedings, describing the design and development of three Google algorithms, its Search and Shopping products, and the inner workings of its search ranking mechanism. The CMC marked the first time a private *Google Shopping* claimant was granted access to the documents relating to the Compliance Mechanism introduced by Google in 2017 following the prohibition decision of the Commission.

In addition, as Google appealed the General Court's judgment to the CJEU, a further round of written and oral submissions by the parties, including Foundem, was required. On 19 September 2023, Foundem made submissions at the oral hearing at the CJEU. Those submissions were on the applicability of the *Bronner* criteria in the *Google Shopping* case and pointed out the misrepresentations of fact which formed the basis of Google's appeal to the CJEU. The written and oral submissions by Foundem and other interveners sought to persuade the CJEU to uphold the Commission's decision despite the Defendants' claims that it failed to meet the legal test for the imposition of a duty to supply access to competitors. The Advocate-General's opinion in the case is expected to be handed down in January 2024, and the Court is expected to deliver its ruling in Q3 2024.

THE ECJ & BREXIT

Tribunal interprets ECJ judgment on limitation and decodes Brexit legislation impact in competition claims

Another significant judgment was handed down in July 2023, when the UK's Competition Appeal Tribunal issued a ruling on the application of last year's ECJ *Volvo* judgment on English limitation rules. The Tribunal rejected the claimants' interpretation that the ECJ judgment introduced a requirement that the limitation period applicable to damages actions could only begin to run once the infringement has ceased.

The Tribunal's judgment also offered for the first time its interpretation of how the UK's withdrawal from the EU impacted the substantive and procedural rights of pre-Brexit claims. The Claimants argued that post-Brexit European judgments were binding on the Tribunal in cases where the causes of action arose before the UK's exit from the European Union. The Tribunal rejected this argument and found that it was not obliged to follow European judgments handed down after the UK's EU exit, although the panel was split 2-1 on its underpinning reasoning.

This judgment is unlikely to be the last time in which parties invite the Tribunal to apply new European court judgments to UK competition cases, and the Tribunal has not closed itself off to the possibility of post-Brexit European rulings influencing its decisions. In fact, on 5 December 2023, the Tribunal granted the Claimants' applications for permission to appeal the judgment. The Tribunal acknowledged that there was "*sufficient public importance*" to merit the case being heard by the Court of Appeal, given the judgment's potential implications for limitation periods in the UK competition law damages claims.

For a deep dive on the different issues examined by this judgment, read our Competition Bulletin article.

COLLECTIVE REDRESS

2023 was also a year of expansion and development for the collective regime, with seven new claims filed and a number of landmark decisions. Our team has prepared a dedicated Year in Review in which they discuss key trends and cases in this area.

THE FUTURE OF DIGITAL MARKET REGULATION IN THE UK AND EU

Looking ahead to 2024, it's likely to be another year with increased competition law enforcement in relation to digital markets in the UK and EU.

Legislative developments in the UK and EU

On the legislative front, 2024 will see further developments in the likely passage of the UK's draft Digital Markets, Competition and Consumer (DMCC) Bill. Intended to implement a "*world-leading regulatory regime in digital markets*," the Bill was finally introduced into Parliament in April this year. It has completed its stages in the House of Commons and has been introduced into the House of Lords. The government estimates that the Bill will deliver a consumer benefit of £9.7 billion over ten years through new rights, stronger law enforcement, and increased competition in digital markets. Recent amendments to the Bill include maintaining a judicial review (i.e. proportionality) standard for appeals of all regulatory decisions excluding fines. They also include requiring a regulator's imposition of conduct requirements or pro-competition interventions to be made only where it is proportionate to do so and there is strong evidence to support the intervention.

For an in-depth view on the aims and policy objectives of the DMCC Bill, read our Competition Bulletin article breaking down the draft legislation and the expected role of the CMA's Digital Markets Unit.

Meanwhile, in Europe the European Commission has this year exercised its powers under the new Digital Markets Act (DMA) to designate six Big Tech companies (Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft) as "gatekeepers".

Gatekeepers are required to ensure they fully comply with the conducts and obligations set out in the DMA within six months in 22 core digital services. These digital services include online advertising, online intermediation services (such as app stores), and social networks.

The Commission's designations will be under scrutiny in 2024, as Apple, Bytedance and Meta have all filed legal challenges to the gatekeeper designation to the EU's General Court.

Ongoing investigations in digital markets

Outside of legislative reform, the CMA continues to investigate Big Tech companies under its existing statutory powers, with some parallels with the European Commission.

This year, the CMA launched an initial review of AI foundation models to assess the likely implications for competition and consumer protection. An initial report was published in September 2023, and an updated report is expected to be published in March 2024.

Both the CMA and the European Commission have ongoing antitrust investigations into Google's ad tech practices and the Apple App Store. In October 2023, the Commission launched a study into mobile ecosystems "*to support the supervision and enforcement of the DMA vis-a-vis the gatekeepers*".

The CMA has already published a market study report on mobile ecosystems, and this year launched a market investigation into mobile browsers and cloud gaming to address possible competition concerns. The market investigation was shut down in April 2023 after the Tribunal ruled the CMA was statutorily time-barred from opening the investigation. However in November 2023 the Court of Appeal ruled in favour of the CMA's appeal, finding that the Tribunal's statutory interpretation would have "*serious consequences*" on the CMA's ability to impose remedies designed to protect consumers in the public interest. Pending any appeal to the Supreme Court, the market investigation may be revived in 2024.

Possible shifts in remedial approaches?

While there remain overlaps in the UK and EU's competition public enforcement priorities, over the next year, we could see a trend of variance in the enforcement approaches between the CMA and the Commission. In assessing Microsoft's high-profile acquisition of gaming platform Activision this year, both regulators found potential competition concerns in the emerging cloud gaming market. The Commission was satisfied that licensing commitments from Microsoft would address its competition concerns in this growing market, whereas the CMA preventing the deal from proceeding, as it found preventing the merger was most effective in allowing the cloud gaming market to effectively develop. Microsoft eventually restructured the deal and was permitted to acquire Activision, on the agreement that cloud streaming rights for the EEA were sold to a competitor.

The diverging approaches in remedial policies may be a trend to watch in 2024 and beyond, particularly as the Commission flexes its newfound powers and the UK's DMCC Bill becomes law.

LOOKING AHEAD

The landscape for competition disputes in 2024 is set to be shaped by anticipated developments in the UK and EU, including the CJEU *Google Shopping* appeal, the appeal of the Volvo Limitation judgment, and the impact of nuanced case management decisions in cases such as *Trucks* and *PSA Automobiles*. Many will welcome the proposed competition enforcement reform on the UK's parliamentary agenda, and it remains to be seen how the Commission will respond to the legal challenges facing its gatekeeper designations.

The approaches adopted by the CMA and European Commission in competition enforcement and remedial outcomes could emerge as a focal point in 2024, as will any contrast in the developments of UK and EU law.

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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Exhibiting 'unrivalled strength in depth', the 'incredible team' at specialist claimant firm Hausfeld & Co LLP handles the full gamut of European damages claims, with particular emphasis on collective actions before the CAT.

Legal 500, 2024