Application of the 'Antitrust' Prohibitions, Domestic and EU: An Analysis of the UK Competition Authority's Enforcement Practice

INTRODUCTION

This article analyses the enforcement practice of the primary UK competition authority over the last 19 years since UK competition law was modernised by the Competition Act 1998.[1] The 1998 Act introduced two prohibitions, the Chapter I and Chapter II prohibitions, modelled directly on the EU prohibitions in Articles 101 and 102 TFEU on anti-competitive agreements and abuses of dominance respectively.[2] Those UK prohibitions entered into force on 1 March 2000, and subsequently Regulation 1/2003 required all National Competition Authorities, including the UK, to also simultaneously apply the EU law prohibitions, where EU competition law applied on the basis that inter-state trade was affected.[3] The Office of Fair Trading undertook this primary enforcement responsibility until its role was assumed by the Competition and Markets Authority as of 1 April 2014 as a result of the Enterprise and Regulatory Reform Act 2013.[4] Prior to that there had been an (unsurprisingly) insightful overview and analysis into the competition work of the OFT to 2010 by Richard Whish.[5] The current research provides a more updated and focused analysis of the enforcement work of the OFT and CMA under the domestic and EU prohibitions from 1 March 2000 to the end of February 2019.[6] The research focuses only on the decisional practice of the OFT/CMA[7] and does not extend to the competition law enforcement practice of the Concurrent Regulators,[8]

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[1] See *The UK Competition Act 1998: A New Era for UK Competition Law* (Rodger and MacCulloch eds.) (Hart, 2000).

[2] The prohibitions are set out in ss 2 and 18 of the Act and must be interpreted consistently with the EU prohibition under s 60 of the Act. See B Rayment, 'The Consistency Principle: Section 60 of the Competition Act 1998', Chapter 4, *Ten Years of UK Competition Law Reform*, (Rodger ed.) (DUP, 2010).

[3] Article 3(1) of Regulation 1/2003. See discussion further infra on this provision and requirement for anti-competitive conduct to affect inter-State trade (AIST) for the EU law rules to apply.

[4] As of… see ERRA 2013 ss25 and 26 and Schedules 4 and 5.

[5] See R Whish, 'The Role of the OFT in UK Competition Law' Chapter 2 in in Rodger ed. 2010 supra.

[6] It should of course be stressed that the CMA's role in UK competition policy and enforcement extends beyond the prohibitions to include *inter alia* market and merger investigations, neither of which will be considered in this study.

[7] The OFT from 1 March 2000 to end March 2014, and the CMA as of 1st April 2014.

[8] It should be noted that s 54 of the 1998 Act provides for the CMA to exercise its powers concurrently with a variety of utility regulators: Office of Gas and Electricity Markets (OFGEM), Office of Communications (OFCOM), Office of Water Services (OFWAT), Office of Rail Regulation (ORR), Monitor, and the Utility Regulator, Northern Ireland (NIAUR).[169] See, for a detailed consideration of this issue, Prosser, T, 'Competition, Regulators and Public Service', in Rodger, BJ and MacCulloch, A, *The UK Competition Act: A New Era for UK Competition Law* (2000) Oxford: Hart. See The Concurrency Regulations, SI 2014/536, under s 54 CA98, as amended by s 51 of the ERRA13. See CMA10, 'Regulated industries: guidance on concurrent application of competition law to regulated industries', March 2014. See for example the recent £50m fine imposed in 2018 by OFCOM on Royal Mail for abusive behaviour, see https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/royal-mail-whistl-competition-law. Note that the Register of Decisions under the 1998 Act includes Decisions taken by the Regulators and indicates the increasing significance of this body of practice, https://www.gov.uk/government/publications/ca98-public-register/ca98-register.

nor does it explore the role and case-law of the Competition Appeal Tribunal,[9] the significance of both meriting full and separate treatment.[10]

A list of all potential Cases with 'Case Outcomes' by the OFT and CMA in the relevant period was compiled. These were reviewed and analysed quantitatively by the author, in an attempt to provide a comprehensive study for the period but it may be either over-inclusive or under-inclusive to some extent.[11] The data on the Case Outcomes was input and analysed using the statistical programme, SPSS for Windows.[12] Frequency analysis was carried out on the Cases, represented in Tables and graphically, and crosstabulations were made between the variables.[13] This has allowed us to provide detailed information about a number of aspects of the competition law enforcement practice of the UK's principal competition authority.

This account is not an audit of the CMA's work, neither attempting to provide an assessment of societal benefits or value for money of the CMA's competition law enforcement tasks,[14] nor a critique of its prioritisation of enforcement strategy.[15] Nonetheless it is important to bear in mind this context in assessing the enforcement record of the OFT and CMA. Although the CMA is an independent non-ministerial Department there are accountability mechanisms[16] on planning and reporting and it is accountable to Parliament for its expenditure. The Government has also provided a strategic steer to the CMA in relation to its tasks, which although set at a high level of abstraction, notes that the CMA should 'conclude enforcement cases as quickly as possible ensuring that it has the maximum possible positive impact on the welfare of consumers'.[17] Moreover, in recent years the CMA, as exemplified by

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[9] See Enterprise Act 2002, Pt 2, particularly s 12. Moreover, it should be stressed here that the data for the OFT/CMA decisional practice does not specifically take into account subsequent rulings by the CAT, for instance where an Infringement decision has been set aside or a penalty reduced, or where an Infringement is found following a non-infringement 'decision' as in for example JJ Burgess & Sons v OFT (Case 1044/2/1/04 [2005] CAT 25.

[10] In relation to the former, see for instance:- Dunne, N, 'Recasting Competition Concurrency Under the Enterprise and Regulatory Reform Act 2013' (2014) 77(2) MLR 254–276; C O'Grady and L Maclean, 'Concurrency past, present, and future: too many cooks?' Comp. L.J. 2014, 13(2), 163-175. In relation to the latter, for a detailed discussion of the development of the CAT, its various roles and its case law, see Bailey, D, 'Early Case-law of the Competition Appeal Tribunal', Ch 2 in, Rodger B, (ed), *Ten Years of UK Competition Law Reform* (2010) Dundee: DUP.

[11] Note further infra on discussion on how Cases are included in the analysis.

[12] SPSS Statistics 25. SPSS is the acronym for Statistical Package for the Social Science, a statistical tool which helps to analyse data.

[13] See Clegg, F *Simple Statistics, A course book for the social sciences*, (Cambridge: CUP, 1990).

[14] The CMA estimated its direct annual average consumer benefits to be £745m in 2014/15.

[15] See further infra re CMA's Prioritisation Principles, and more generally see Lucey, M-C, 'Editorial-The Chicken or the Egg? Dilemmas in Framing Enforcement Priorities' (2018) Comp L. Rev 13(1) 1-8 and Kovacic, W E 'Deciding What to Do and How to Do it: Prioritization, Project Selection and Agency Effectiveness' (2018) Comp L. Rev 13(1) 9-26, available at https://clasf.org/browse-the-complrev/.

[16] Set out in Schedule 4 paras 12-14 of the Act.

[17] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481040/BIS-15-659-government-response-governments-strategic-steer-to-the-competition-and-markets-authority.pdf at 10.

its annual plan[18] and speeches by senior CMA officials, has explicitly sought to increase and enhance the volume, speed and effectiveness of its competition enforcement processes,[19] partly in response to criticism by the National Audit Office in its report in 2016 on the UK Competition Regime. In particular the NAO was critical of the limited number of enforcement decisions and paltry level of fines which had been imposed, estimated at £65m between 2012-2014.[20]

One particular aspect of the CMA's enforcement practice is particularly prescient in the context of the imminent withdrawal of the UK from the EU ('Brexit'), namely the way in which the OFT/CMA has acted as an NCA in enforcing the EU law prohibitions. Regulation 1/2003 both imposes a requirement to apply the EU law prohibitions and provides mechanisms for co-operation and co-ordination with the Commission and notably other NCAs.[21] Moreover, the Commission's Network Notice[22] envisages co-ordination in enforcement between

[18] See Competition Markets Authority Annual Plan 2015/16 Presented to Parliament pursuant to paragraph 13(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 March 2015 CMA34 at para 3.4 'This reflects our ambition to deliver a visibly higher level of robust enforcement cases to raise awareness and achieve credible deterrence across the UK economy.'; Competition and Markets Authority Annual Plan 2016/17 Presented to Parliament pursuant to paragraph 13(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 March 2016 CMA52 at para 2.6 At the same time, we are have made clear that there remains work to be done in increasing the volume and speed of case work. Our figures for opening new cases and the speed with which we have progressed them compare favourably with past practice in UK competition enforcement, but we are determined to improve this record.' ; Annual Plan 2017/18 Presented to Parliament pursuant to paragraph 13(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 March 2017 CMA59 at para 3.6 'We have exceeded our annual targets for opening new civil competition enforcement cases (under the prohibitions in the Competition Act 1998 and the EU equivalents) in each of our first three years, including opening ten new cases in 2016/17 against a target of four. 12 3.7 In this Annual Plan we increase this target by 50%, to a minimum of six new civil competition enforcement investigations for the year.'; Annual Plan 2018/19 Presented to Parliament pursuant to paragraph 13(2) of Schedule 4 to the Enterprise and Regulatory Reform Act 2013 March 2018 CMA75 para 2.9:-'In 2017/18 we increased our annual target for launching new competition enforcement investigations, from four to six. We are further increasing this target for 2018/19, to ten new investigations.'

[19] See for instance, Michael Grenfell on the CMA's approach to competition enforcement, 12 nov 2015 https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-approach-to-competition-enforcement; Sarah Cardell speaks about the CMA's enforcement priorities and approach, 23 February 2016, https://www.gov.uk/government/speeches/sarah-cardell-speaks-about-the-cmas-enforcement-priorities-and-approachMichael Grenfell, 29 November 2017, UK competition enforcement – where next?, https://www.gov.uk/government/speeches/uk-competition-enforcement-where-next; see also more recently and more broadly, Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy, 'A letter and summary outlining proposals for reform of the competition and consumer protection regimes from the Chair of the Competition and Markets Authority' https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy.

[20] See NAO report at https://www.nao.org.uk/report/the-uk-competition-regime/#. It drew comparisons with the fines of almost £1.4bn imposed by the German competition authority in the same period. See also https://www.gov.uk/government/news/cma-welcomes-nao-report

[21] As observed further infra, there is limited evidence of the extent to which these co-operation mechanisms have been used in practice by the OFT/CMA.

[22] Notice on co--operation within the Network of Competition Authorities, [2004] OJ C101/43.

different Member State NCAs in applying the EU prohibitions to cross-border infringements. Post-Brexit, when the UK is outside the EU, the CMA will no longer be part of the ECN, nor be required to apply EU law or (be able) to co-operate and coordinate enforcement with other MS NCAs.[23] The final part of the article will accordingly explore the CMA (and OFT) practice in relation to the enforcement of EU law, in particular its assessment of the relevant geographical market of alleged infringements, its application of the affecting inter-state trade test,[24] and the extent to which there has been evidence of multi-state enforcement co-operation with other MS, in order to consider the potential impact of Brexit on CMA enforcement in relation to the prohibitions.[25]

This article will look at the number of Case Outcomes over the relevant period, followed by observing the Competition Rules Applied and Case Outcomes in those Cases undertaken by the primary UK Competition Authority, before crosstabulating the information analysed under these categories. The data on the application of the EU prohibitions in this context leads to the following two sections on related themes, noting the apparent dissonance in approach to the determination of the relevant geographical market and the affecting inter-state trade doctrine, illustrating the emphasis by the OFT/CMA on localised markets and UK-wide markets at most even where applying the EU law prohibitions. The article then considers the rather disappointing comparative track record of application of the EU law prohibitions by the UK NCA before a concluding section which assesses the potential rationale for limited enforcement case output to date and the more recent attempts by the CMA to tackle and address this problem.

CASE OUTCOME TOTALS

As discussed in the introduction, the data here represents the decisional practice of the CMA (and its predecessor the OFT) based on information derived from the CMA's website, selecting Cases and the Option for CA98 and Civil Cartels.[26] These were cross-checked against the Register of Decisions.[27] It should be stressed that the CMA has considerable discretion at the case initiation stage as to whether to formally open an investigation,[28] dependent upon satisfaction of the Competition Act 1998 s25 'reasonable grounds for suspicion' threshold and

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[23] It is anticipated that the UK will seek to negotiate a MoU with the EU on suitable co-operation arrangements between the CMA and the Commission/NCAs.

[24] See discussion further infra. See Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235. See also the Commission 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty', [2004] OJ C101/81.

[25] Given that the domestic prohibitions are identical to Articles 101 and 102 (except for the AIST requirement) and are required to be interpreted consistently with those rules in accordance with s 60 of the 1998 Act.

[26]https://www.gov.uk/cma-cases?case_type%5B%5D=ca98-and-civil-cartels&closed_date%5Bfrom%5D=&closed_date%5Bto%5D=&page=1.

[27] https://www.gov.uk/government/publications/ca98-public-register/ca98-register. Note this does not include informal case closure outcomes and extends to decisions by the Regulators.

[28] Competition Act 1998: Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases, CMA8, 18th January 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771970/CMA8_CA98_guidance.pdf

that the case is in line with its published Prioritisation Principles.[29] Subsequently, the investigation may on occasion be closed on administrative priority grounds where no formal decision is taken, or on the basis of a range of formal decisions:- Infringement decision' No Grounds for Action decision and a Commitments decision.[30]

At the date of research (end February 2019), the CMA website shows 131 cases.[31] A number of these were still in the investigation phase and there has been no formal or informal decision taken. The cases appear on a list[32] in chronological order (more or less) back to the first case in 2001. In this analysis we will count as a Case Outcome any Case where an investigation has started[33] and the process terminated by the OFT/CMA, either through a formal decision or informal notification of closure of the investigation.[34] Case Outcomes have been coded on the basis of the date of the decision rather than when the decision was published, although with Infringement decisions the relevant date has been taken to be the date of publication of the Non-Confidential Version ('NCV') of the Decision. Most of the CMA case weblinks will constitute one separate Case Outcome[35] but where there are multiple separate decisions, albeit related and under the same CMA web link, these will be considered and coded as separate Case Outcomes.[36] In the 19 years since the Competition Act prohibition came into force,[37] there have been a total of 115 Case Outcomes at an average of circa 6 case outcomes a year (not necessarily formal decisions, never mind Infringement decisions). There were 28 Case Outcomes in the years 2002-2004, and spikes in Case Outcomes in 2013 and 2017, with 14 in both years. Otherwise the highest number of Case Outcomes was 7 (in 2007 and 2011). There was some criticism of the OFT for its relative inaction during the noughties[38] and there were relatively few decisions at all between 2005 and 2012, with 33 in total in that 8 year period. It should nonetheless be recognised that there followed a larger tranche of Case

[29] CMA16, April 2014, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf.

[30] For completeness, the fuller panoply of softer enforcement in the background of formal investigations, including warning and advisory letters, should also be recognised:- https://www.gov.uk/government/publications/competition-law-warning-and-advisory-letters-register

[31] As at the end February 2019, 19 years since the prohibitions entered into force on 1 March 2000.

[32] It seems that the CMA system reinstates a Case at any stage where there has been an addition to the webpage. Accordingly for instance, a 2010 Decision may appear much later where there has been a subsequent ruling by the Competition Appeal Tribunal.

[33] Note the threshold for investigation under section 25 of the Competition Act 1998 is that the CMA has reasonable grounds for suspecting an infringement of either prohibition.

[34] However, see for example, Hotel Online Booking (2017) where the entry on the Case Register provides only an update on the CMA's monitoring work and is not included as a case. (see also Visa sponsorship Arrangements for Olympics (2012)).

[35] Even in Construction bid-rigging in England (2009) involving over 100 parties; https://www.gov.uk/cma-cases/construction-industry-in-england-bid-rigging

[36] See for instance Mercedes-Benz, Distribution of Commercial Vehicles (trucks and vans) (2013) involving 5 separate decisions on the same Case page, https://www.gov.uk/cma-cases/mercedes-benz-distribution-of-commercial-vehicles-trucks-and-vans.

[37] 1st March 2000.

[38] See for instance Whish supra at p14, and the National Audit Office, *Enforcing Competition in Markets*, HC 593 Session 2005-06.

Outcomes in 2013 (14) and that in assessing the raw data one ought to take into account the years of work preceding the extensive construction bid-rigging cartel case outcome in 2009 involving over 100 companies.[39] The Case Outcome totals in the early period since the CMA assumed the role of the OFT in this context mid 2014 seem relatively disappointing but 2017 marked a significant step forward with 14 Case Outcomes. Although there was a relatively meagre 4 Case Outcomes in 2018, there are clearly, as evidenced by the CMA's case list, a significant number of ongoing investigations.[40] The data suggests that the CMA have been slightly more active in relation to decisional practice than the OFT (with the exception of 2002-2004 and 2013) with 29 Case Outcomes (7.25pa) between 2015-2018. Moreover, as observed below, 18 of the 49 Infringement and Fine decisions (36.7%) have come in this most recent 4 year period. Table 1 and Chart 1 demonstrate the number of Case Outcomes per year.

Table 1- Case Outcomes per Year

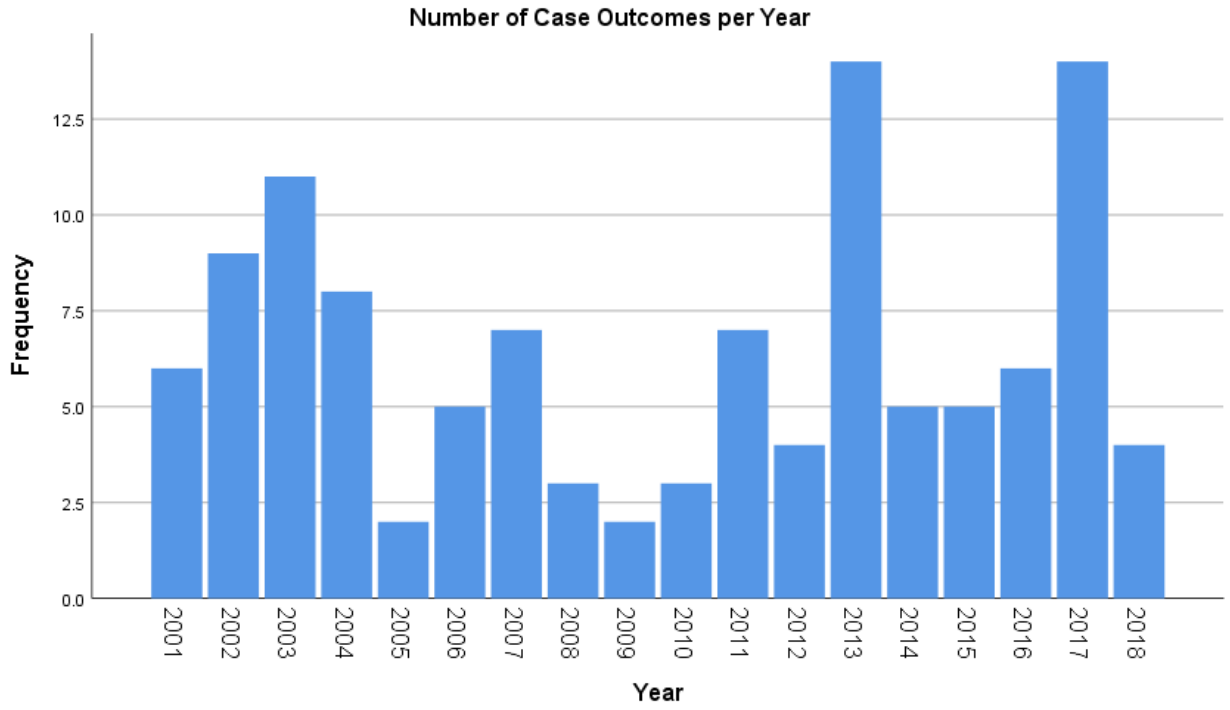
Year

	Frequency	Percent	Cumulative Percent
2001	6	5.2	5.2
2002	9	7.8	13.0
2003	11	9.6	22.6
2004	8	7.0	29.6
2005	2	1.7	31.3
2006	5	4.3	35.7
2007	7	6.1	41.7
2008	3	2.6	44.3
2009	2	1.7	46.1
2010	3	2.6	48.7
2011	7	6.1	54.8
2012	4	3.5	58.3
2013	14	12.2	70.4
2014	5	4.3	74.8
2015	5	4.3	79.1
2016	6	5.2	84.3
2017	14	12.2	96.5
2018	4	3.5	100.0
Total	115	100.0	

[39] Case No. CE/4327-04, https://www.gov.uk/cma-cases/construction-industry-in-england-bid-rigging.

[40] The CMA website indicates 23 ongoing investigations, at different stages, albeit several appear to be closely related in terms of market sector.

Chart 1- Case Outcomes per Year



COMPETITION RULES APPLIED

The cases were coded according to the rules which the authority sought to apply to the alleged anti-competitive behaviour: this encompassed the domestic prohibitions on anti-competitive agreements and abuses of a dominant position[41] known as the Chapter I and Chapter II prohibitions, and Articles 101 and 102 TFEU, and various combinations of the four rules.[42] The most notable aspect is the predominance of cases involving the Chapter I prohibition on anti-competitive agreements. Cases involving Chapter I alone constitute 43.5% (50 case outcomes) of the total number of Cases and there were 27 cases involving the potential application of Chapter I and Article 101 (23.5%). Accordingly, anti-competitive agreements cases alone counted for 77 cases (67%). The Chapter I prohibition (including cases together with the abuse prohibitions) was involved in a total of 69.6% of cases.[43] The abuse prohibitions (Chapter II, Article 102, or a combination) alone were applied in only 35 cases (30.5% of Cases) and in total, together with the anti-competitive agreements prohibitions, in 38 cases (33.1%). This demonstrates a clear prioritisation of investigations relating to the anti-competitive agreements prohibitions. This may reflect various factors:- the less discretionary nature of such investigations where leniency applications have been made; the perceived impact on consumers of anti-competitive harm from such arrangements; and the relative ease/difficulty in establishing infringements under the two types of

[41] Sections 2 and 18 of the Competition Act 1998 respectively.
[42] Note that there were no cases involving the application of Article 101 alone.
[43] 80 in total, including the cases in the Chapter 1/Chapter II and All 4 prohibitions Categories.

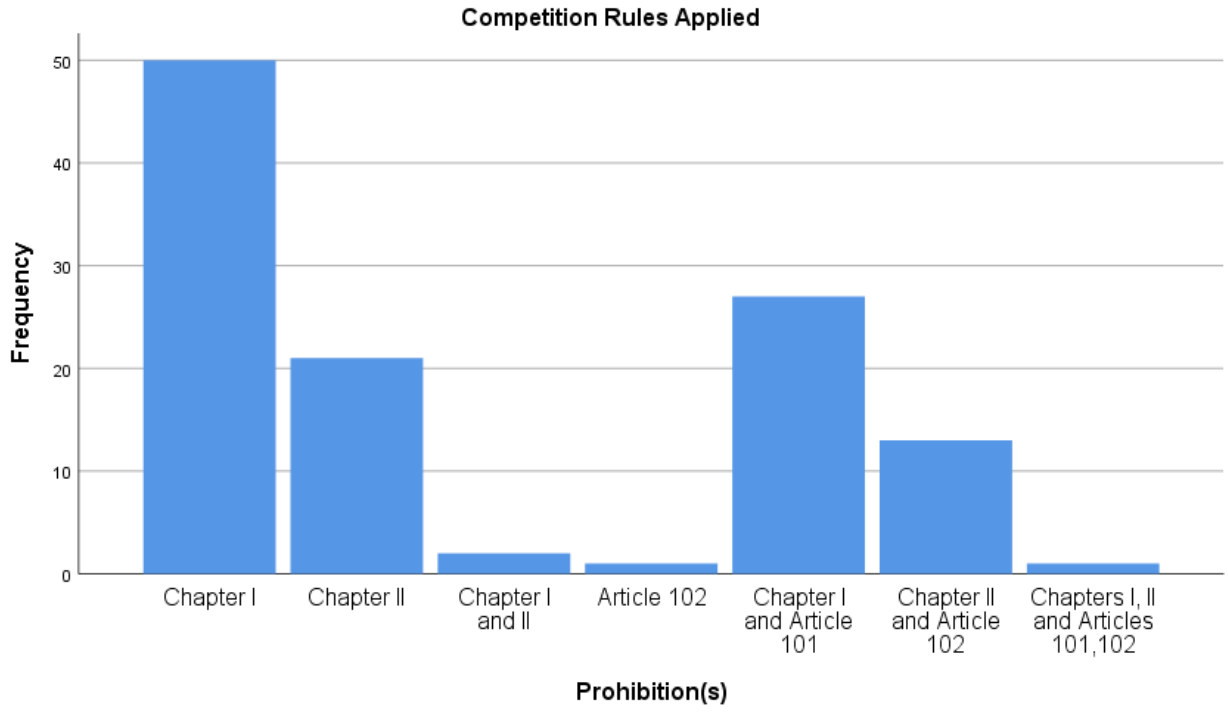
prohibition. At this stage it should also be noted that in total 42 of the 115 cases (36.5%) considered the application of either or both of the EU prohibitions, alone or in combination with other provisions. We will seek to drill down into the rationale behind this relatively low figure (in total, and percentage), later in this analysis of the decisional practice. The reliance on the various prohibitions in the Case Outcomes is demonstrated by Table 2 and Chart 2.

Table 2- Competition Rules Applied

Competition Rules Applied

	Frequency	Percent	Cumulative Percent
Chapter I	50	43.5	43.5
Chapter II	21	18.3	61.8
Chapter I and II	2	1.7	63.5
Article 102	1	.9	64.3
Chapter I and Article 101	27	23.5	87.8
Chapter II and Article 102	13	11.3	99.1
Chapters I, II and Articles 101,102	1	.9	100.0
Total	115	100.0	

Chart 2- Competition Rules Applied



CASE OUTCOMES

Before coding the cases, we looked at the range of different outcomes available.[44] There are 8 alternative Case Outcomes in total, some of them closely related. The most obvious outcome is an infringement and Fine,[45] and this was the result in 42.6% of the cases (49 cases). There was a small, related category of Infringement where no Fine was imposed with only 6 cases (5.2%), for a variety of different reasons. The first of these was in 2003, Northern Ireland Livestock and Auctioneer's Association,[46] where no fine was imposed in the circumstances where the arrangement was overt and there had been outbreaks of BSE and FMD; in 2003 no fine was imposed in Lladro,[47] because of the background context of earlier Commission comfort letters having been issued; in 2004, AtTheRaces, there was an infringement and although no exemption was granted from the Chapter I prohibition, there was immunity from fine on the basis of the notification of the arrangement;[48] in 2008 no fine was imposed in Cardiff Bus where there was immunity due to the applicable turnover threshold in the infringement market;[49] finally in 2013/2014 no fine was imposed in either of two related Infringement Decisions in relation to mobility scooters (Roma (2013)[50] and Pride Mobility Products Ltd (2014)[51]) where both sets of arrangements fell within the section 39(3) immunity from fines for small agreements.

There were a range of different non-infringement outcomes. There were only 4 exemptions (3.5%) but this potential outcome was in any event no longer available as of 1st May 2004 (in line with Commission enforcement practice post-Reg 1/2003).[52] There were only 5 cases formally concluded with Commitments accepted,[53] which on the other hand were only

[44] This study will not consider the limited body of interim decisions taken under s35(2)(a) of the 1998 Act.

[45] It has been decided not to Code cases on the basis of whether any directions were imposed under sections 32/33 of the 1998 Act. It is accepted that in certain cases there may be substantive directions (e.g. in pricing abuses), though mainly directions are effectively simply to stop the infringement, and in many cases, no directions are made, notably where the infringement has already stopped.

[46] Case CA98/1/2003, https://www.gov.uk/cma-cases/northern-ireland-livestock-and-auctioneers-association-commission-on-livestock-purchases.

[47] Case CA98/04/2003, https://www.gov.uk/cma-cases/lladr-comercial-sa-price-fixing-agreements.

[48] Case CA98/2/2004, https://www.gov.uk/cma-cases/attheraces-investigation-into-collective-selling-of-media-rights. Decision overturned by the CAT, [2005] CAT 29.

[49] CA98/01/2008, https://www.gov.uk/cma-cases/cardiff-bus-alleged-abuse-of-a-dominant-position.

[50] Case Reference CE/9578-12, https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector.

[51] Ibid.

[52] Article 10 of Regulation 1/2003 provides the Commission with the power to make individual decisions of inapplicability on the basis of 101(3). It has never been used, though; the Commission is clearly keen for Article 10 not to lead to a recreation of the old individual exemption system.

[53] Note there was also one Case Outcome where there were no formal commitments but assurances were accepted informally- in 2013 in UK Asbestos Training, where there was a brief notice that the case was closed and the arrangement ended on the basis of those assurances- https://www.gov.uk/cma-cases/uk-asbestos-training-association-provision-of-training-services-to-the-construction-industry.

available after 1st May 2004. The first was in 2006 in Associated Newspapers,[54] involving the Chapter II prohibition where only a summary of work was published and it was stated that there was No Grounds for Action (NGA) on the basis of accepted revised commitments. The next commitments outcome was in 2011, and this time involved a formal decision to accept commitments in a Chapter I and Art 101 investigation in Private Motor Insurance: Exchange of Data;[55] commitments were accepted in 2014 in relation to an investigation into exclusive supply arrangements in the Distribution of road fuels in parts of Scotland under the Chapter II prohibition,[56] and under Chapter II/Article 102 in the supply of service, maintenance and repair platforms.[57] A decision to accept commitments in relation to auction services was made in 2017 where the investigation was in relation to all 4 prohibitions.[58] The final commitments decision (to date) was also in 2017 in an investigation under Chapter I in relation to certain rules of the Showman's Guild of Great Britain.[59] As evidenced by the Rule/Outcomes crosstabulation, commitments have been accepted in relation to investigations involving the range of different UK and EU prohibitions.

There were 17 Non-Infringement decisions[60] and 8 no Grounds For Action (NGA) decisions, constituting 21.8% of the total number of Case Outcomes being resolved formally on the basis that there was no infringement finding.[61] The OFT (and latterly the CMA) developed further informal methods of closing cases based on their published Case Prioritisation Principles,[62] which specifically refer to the following factors:- impact, strategic significance, risks and resources. These principles lie behind the Case Closure–Administrative Priorities Category which is 2nd most frequent to the Infringement and Fine category at 20% (23 cases) of all outcomes, together with the hybrid category where the authority considered there to be No grounds of Action based on administrative priorities, involving 3 cases. Accordingly, nearly a quarter (22.4%) of cases were closed informally on the basis of administrative priorities-normally with very little information published. The first of these appeared in 2007, with 4 cases in that year.[63] Although we have designated a small separate category of NGA-AP, in

[54] CA98/2/2006, https://www.gov.uk/cma-cases/associated-newspapers-ltd-alleged-abuse-of-a-dominant-position.

[55] Case CE/9388/10, https://www.gov.uk/cma-cases/private-motor-insurance-exchange-of-data

[56] Coded as a commitments decision though partly closed on AP grounds. Case MP-SIP/0034/10, https://www.gov.uk/cma-cases/investigation-into-the-distribution-of-road-fuels-in-parts-of-scotland.

[57] Case CE/9496-11, https://www.gov.uk/cma-cases/investigation-into-the-supply-of-vehicle-service-maintenance-and-repair-platforms-in-the-uk.

[58] Case number 50408, https://www.gov.uk/cma-cases/auction-services-anti-competitive-practices.

[59] Case number 50243, https://www.gov.uk/cma-cases/leisure-sector-anti-competitive-practices.

[60] see *Prezes Urzedu Ochrony Konkurencji i Konsumentow v Tele2 Polska sp z oo (now Netia SA)* (Case C-375/09), [2011] 5 CMLR 2; See A Svetlicinii, M Bernatt and M Botta, 'The "dark matter" in EU competition law: non-infringement decisions in the new EU Member States before and after Tele2 Polska' [2018] ELRev 424.

[61] See further infra.

[62]CMA16,April2014,https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299784/CMA16.pdf. See Lucey and Kovacic supra.

[63] Though note Notification of the British Insurers (2004) which was coded as an Exemption on the basis of the original decision in 2004, but after an appeal to the CAT, the OFT, after reconsideration,

effect those cases are identical in effect to those where those where the case was closed on the basis of administrative priorities. In most cases, the web page gave a very brief summary explaining that as a matter of administrative priorities it would be appropriate for the OFT/CMA to close the investigation, often mentioning the need to prioritise other cases,[64] and/or the limited customer concern or effect of the alleged behaviour.[65] There are two particularly interesting cases where the OFT in its case closure summary indicated that the rationale was that the case was being closed on AP principles on the basis that the Commission was in a better place to deal with the matter comprehensively:- E-Books investigation (2011) and Commercial Vehicle manufacturers (2012).[66] Later in 2015 the Hotel Online booking investigation was closed on the basis of administrative priorities, on the basis of various developments, including the investigations undertaken by various other competition authorities and discussions with those authorities.[67] These three cases,[68] together with the Infringement finding in the Modelling Sector case,[69] are indeed the only investigations[70] where the UK authorities in their decision-making expressly alluded to co-

considered the case no longer constituted an administrative priority. Case CA98/04/2004, https://www.gov.uk/cma-cases/association-of-british-insurers-general-terms-of-agreement

[64] See eg Oakley, Price-fixing of sunglasses (2007), Case CE/2471/03, https://www.gov.uk/cma-cases/oakley-investigation-into-price-fixing-of-sunglasses.

[65] See eg London Metal Exchange and (2007), Case CE/4478-04, https://www.gov.uk/cma-cases/london-metal-exchange-complaint-from-spectron-group-plc.

[66] Case CE/9440-11, https://www.gov.uk/cma-cases/e-books-investigation-into-anti-competitive-arrangements-between-some-publishers-and-retailers; and Case CE/9349-10, https://www.gov.uk/cma-cases/commercial-vehicle-manufacturers-civil-cartel-investigation.

[67] Case CE/9320-10, https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation.

[68] See also notification on the website in 2017 re Hotel Online Booking, (https://www.gov.uk/cma-cases/online-travel-agents-monitoring-of-pricing-practices). Though interesting, it is excluded from the formal case-list as it was essentially a follow up or monitoring of practices and an update of the 2015 case:- " the results of our monitoring work are currently being collated and analysed and will be published in an ECN report early next year. The CMA along with the 9 other competition agencies who took part in the monitoring work and the European Commission will be considering the results and discussing next steps in early 2017…..

April 2017- In light of the findings in the European Competition Network (ECN) report on the results of a monitoring exercise in the hotel online booking sector, the CMA has decided not to prioritise further investigation on the application of competition law to pricing practices in this sector at this stage."

[69] See also Modelling (2017) https://www.gov.uk/cma-cases/conduct-in-the-clothing-footwear-and-fashion-sector:- " The French and the Italian national competition authorities have recently announced penalties following investigations into the modelling services sector. The CMA has liaised with both authorities throughout its investigation. The CMA's case concerns separate conduct…"

[70] See also the more complicated scenario in relation to Interchange Fees: Mastercard and Visa:- (2015)- where it was considered that administrative priorities meant it no longer merited the continued allocation of resources as not fitting within the CMA's casework priorities.

See https://www.gov.uk/cma-cases/investigation-into-interchange-fees-mastercard-visa-mifs:- "The CMA reached this decision in light of the regulation of the European Parliament and of the Council on interchange fees for card-based payment transactions (the 'Interchange Fee Regulation') soon coming into force

In 2009, and again in 2012, the Office of Fair Trading (OFT) stated that it did not expect to issue statements of objections (if at all) in relation to these investigations prior to the determination of

operation with other competition authorities in the use of their enforcement and decision-making powers. The CMA appears to resort less frequently to AP case closure outcomes more recently, for instance in 2017/2018 only 3 of the 18 cases had this Case Outcome. The resort to the various Case Outcomes in the decisional practice of the OFT and CMA is demonstrated by Table 3 and Chart 3.

It is now widely recognised that leniency can both destabilise existing cartels and deter the formation of future cartels.[71] The OFT introduced a leniency policy at the same time as the Chapter I prohibition came into force, and the leniency policy has been modified most recently in April 2018 and is set out in the 'CMA's Guidance on the Appropriate Amount of a Penalty'.[72] In relation to corporate infringements, there are three types of leniency available to undertakings. It should be noted that leniency--plus is also available under the CMA's leniency policy. Accordingly, an additional fine discount may be awarded in one market where an undertaking receives leniency in a second market.

Although the specifics of the leniency policy have varied, the general impact in uncovering secret cartels has been clearly evidenced by the enforcement practice in the UK, in relation to the Chapter I and Article 101 TFEU prohibitions. Hasbro was the first beneficiary to be granted leniency, in *Toys and Games* (2003) and the various levels of potential leniency available was demonstrated in *Replica Football Kit* (2003). After Hasbro, until the end of 2014, every anti-competitive agreement Infringement and Fine Case Outcome involved leniency (All 23 cases including Hasbro):- whether a sole application receiving full leniency (Long Haul passenger Fuel Surcharges 2012); multiple parties and different levels of leniency (flat roofs, NE England (2005)) or leniency plus (Dairy (2011). However, since 2015, of 17 Infringement and Fine cases involving anti-competitive agreements, 10 Cases involved no leniency application whatsoever. This is a fairly dramatic shift in the enforcement context for the CMA in relation to anti-competitive agreements.

Settlement is a voluntary process whereby an undertaking admits an infringement of the prohibitions in exchange for an expedited process and a reduction in fine – akin effectively to

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MasterCard's appeals against the European Commission's 2007 infringement decision against MasterCard's interchange fee arrangements for intra-European cross-border transactions.
In 2009 and 2011, the UK Government, with the OFT acting as lead department, intervened in support of the European Commission in relation to MasterCard's appeal to the General Court against the above mentioned decision. On 24 May 2012, the General Court dismissed MasterCard's appeal.
On 4 August 2012, MasterCard filed an appeal of the judgment of the General Court to the Court of Justice. On 31 October 2012, the UK Government, with the OFT acting as lead department, submitted a response to the Court of Justice in support of the European Commission's decision and the General Court judgment. On 4 July 2013, the oral hearing in MasterCard's appeal to the Court of Justice was held at which the UK Government, with the OFT as lead department, again intervened in support of the European Commission. The Court's judgment, which upheld the European Commission's infringement decision against MasterCard, was handed down on 11 September 2014."

[71] See, for example, Leslie, C, 'Antitrust Amnesty, Game Theory and Cartel Stability' (2006) *Journal of Corporation Law* 453.

[72] CMA73, 18 April 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf. See also See the CMA's guidance Applications for leniency and no-action in cartel cases (OFT1495).

a plea--bargaining process. A settlement policy may benefit suspect undertakings by reducing financial penalties and enhance the efficacy and efficiency of a competition authority's enforcement strategy by leading to a faster outcome and reduced costs, as a lengthy administrative procedure is avoided. In the UK, the OFT had operated an informal 'settlements' policy whereby certain cases were brought to a swift conclusion by a process known as 'early resolution agreements'. This was evidenced, for instance, in *Independent Schools*,[73] *Airline Passenger Fuel Surcharges for Long Haul Passenger Flights*,[74] *Dairy*[75] and *Tobacco*.[76] In some of the initial early resolution cases, parties were given reductions of up to 35%, for instance in *Dairy*, for their co-operation, and early resolution was also applied in abuse cases, for example a 15% fine discount was given to Reckitt Benckeser in 2011. The settlement process was subsequently formalised by the adoption of a specific Procedural Rule and the publication of OFT 423, 'OFT's Guidance as to the Appropriate Amount of a Penalty' on 1 Sep 2012. The CMA's settlement policy is now set out in 'Competition Act 1998: Guidance on the CMA's Investigation Procedures in Competition Act 1998 Cases',[77] The CMA may consider settlement for any case, provided the evidential standard for giving notice of its proposed infringement decision is met, and the reward for a business which settles is a settlement discount, which will be capped at 20% for settlement pre-Statement of Objections and 10% for settlement post-Statement of Objections. It is evident that over a considerable period after 2012, virtually every infringement finding involved settlement (for instance all 7 Infringement and Fine cases between 2014-2016), and a 20% reduction for the parties involved. Virtually all cases were full settlement, with all parties co-operating, although there were some instances of partial settlement, for instance Mercedes Benz (2013) where only some parties took part in the settlement process. However, it is particularly notable that in 2017 and 2018 there have been no fewer than 6 Infringement (and Fine) findings – Modelling Sector, Galvanised Steel Tanks (Information Exchange), Laundry Services, Paroxetine, Ping and Phenytoin Sodium- where settlement has not been involved at all. This is a worrying trend which also reflects the data on leniency applications in the same period (and involving most of the same cases).

[73] The OFT imposed a reduced fine of £10,000 on each participant in the systematic exchange of information on future fees by a group of 50 independent fee--paying schools, in return for a voluntary admission by those parties and an *ex gratia* payment to fund a £3m educational trust See OFT press release 166/06, 23 November 2006.

[74] OFT Decision CE/7691–06.

[75] OFT Decision CA98/03/2011.

[76] OFT Decision CA98/01/2010, all available at www.oft.gov.uk/OFTwork/competition--act-and--cartels/ca98/decisions.

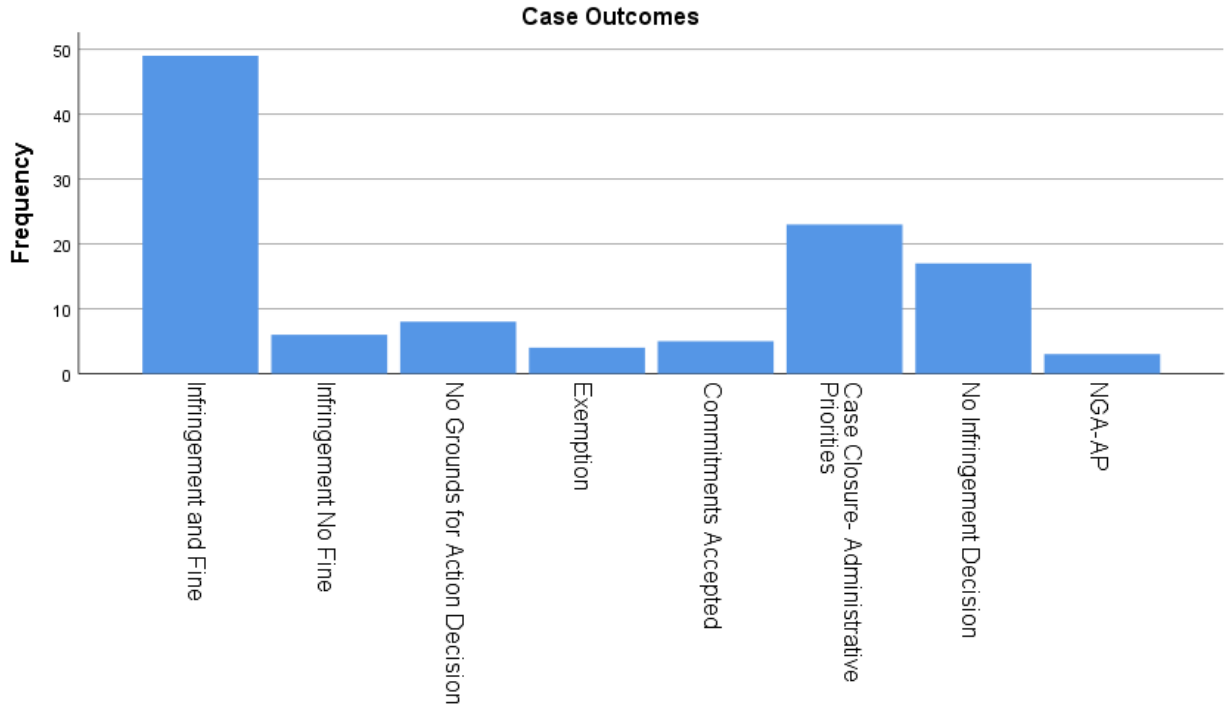
[77] See Rule 9 of the CMA's Rules set out in the Schedule to the The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014, SI/2014/458. See CMA8, 18th January 2019, pp68-77. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771970/CMA8_CA98_guidance.pdf See also paragraph 2.1 and 2.30 of the CMA's Guidance as to the appropriate amount of a penalty (CMA73).

Table 3- Case Outcomes

Case Outcomes

	Frequency	Percent	Cumulative Percent
Infringement and Fine	49	43.1	42.6
Infringement No Fine	6	5.2	47.8
No Grounds for Action Decision	8	7	54.8
Exemption	4	3.5	58.3
Commitments Accepted	5	4.3	62.6
Case Closure- Administrative Priorities	23	20	82.6
No Infringement Decision	17	14.8	97.4
NGA-AP	3	2.6	100.0
Total	115	100.0	

Chart 3- Case Outcomes



CROSSTABULATION ANALYSIS OF THE CASE OUTCOMES

Year/Rule

In looking at the crosstabulation between the year and rule applied, inevitably the application of the domestic rules prevails in the early period, particularly in the period 2002-2004.

Subsequently there was steady and continuous application of the Chapter I prohibition with a spike in 2013 (8). Since 2011 there has been fairly consistent combined use of Chapter I with Art 101, with a particularly high level of 7 cases in 2017. The period of 2002-2004 witnessed relatively frequent use of the Chapter II prohibition with some high-profile cases, thought its use (alone) has been sporadic since then. There was a 'quiet'[78] enforcement period between 2005 and 2010 (with the notable exception of 2007 with 7 cases) but since then there has been relatively frequent application of Chapter II and Article 102 combined, which may explain the dearth of Chapter II (alone) cases.

Table 4- Year/Rule Crosstabulation

		Competition Rules Applied						
		Chapter I	Chapter II	Chapter I and II	Article 102	Chapter I and Article 101	Chapter II and Article 102	Chapters I, II and Articles 101,102
Year	2001	1	3	2	0	0	0	0
	2002	5	4	0	0	0	0	0
	2003	7	4	0	0	0	0	0
	2004	5	3	0	0	0	0	0
	2005	2	0	0	0	0	0	0
	2006	4	1	0	0	0	0	0
	2007	2	0	0	1	0	4	0
	2008	1	2	0	0	0	0	0
	2009	2	0	0	0	0	0	0
	2010	2	1	0	0	0	0	0
	2011	1	0	0	0	4	2	0
	2012	1	0	0	0	3	0	0
	2013	8	2	0	0	3	1	0
	2014	2	1	0	0	1	1	0
	2015	1	0	0	0	3	1	0
	2016	1	0	0	0	4	1	0
	2017	3	0	0	0	7	3	1
	2018	2	0	0	0	2	0	0
Total		50	21	2	1	27	13	1

[78] See for instance Whish supra at p14.

Year/Outcome

Various issues merit comment:- the early cluster of Infringement and Fine cases in 2002/2003 and (reflecting the number of total Case Outcomes) the spikes of 6 and 9 Infringement and Fine Outcomes in 2013 and 2017 respectively. Moreover, the 16 Infringement and Fine outcomes in the 3 years 2016-2018 demonstrates the CMA's increasing workload, and although the number of Case Outcomes in 2018 is disappointing there are a considerable number of cases 'in the pipeline'.[79] Inevitably, all 4 exemption decisions were in 2004 or before. Similarly, all 17 of the Non-Infringement decisions – including the first 3 Case Outcomes under the new Competition Act in 2001,[80] were made prior to 2005, and Non-infringement decisions no longer form part of the decisional practice of the CMA (and earlier the OFT).[81] Since 2005, cases have been closed formally on the basis of a no Grounds for Action decision in 8 cases between 2006 and 2017 on a regular, if infrequent basis. Informal case closure on the basis of the CMA's prioritisation principles,[82] involving most commonly a very brief statement on the relevant web page, now predominates in cases where there is not ultimately an Infringement finding. Since 2007, there have been 74 Case Outcomes, including inter alia 36 Infringement findings (48.6%), and 26 resolved informally on the basis of administrative priorities (35.1% or indeed 68.4% of the remainder of the non-Infringement Case Outcomes). Although informal case closure due to administrative priorities is a continuing practice (7 between 2015- 2018 under the CMA) this method of informal case closure was particularly prevalent between 2007-2013 with 19 cases (of the total 26) closed in this way (in combination with the brief use of a similar outcome, NGA-AP case closures, in 2007/8). The particular frequency of resort to this form of outcome may be explicable on the basis of a series of rulings by the CAT in the early noughties, including notably the *Bettercare* ruling,[83] on what constitutes an appealable (to the CAT) decision.[84]

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[79] https://www.gov.uk/cma-cases?parent=&keywords=&case_type%5B%5D=ca98-and-civil-cartels&closed_date%5Bfrom%5D=&closed_date%5Bto%5D=.

[80] Dixons Store Group Ltd, Case CA98/03/2001, https://www.gov.uk/cma-cases/dsg-retail-compaq-computer-packard-bell-nec-complaint-about-exclusive-agreements; Consignia plc and Postal Preference Service Ltd, Case CA98/4/2001, https://www.gov.uk/cma-cases/consignia-and-postal-preference-service-ltd-use-of-royal-mail-trade-marks; and ICL/Synstar, Case CA98/6/2001, https://www.gov.uk/cma-cases/icl-synstar-maintenance-of-computer-equipment-with-mainframe-functionality.

[81] See https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases. Interestingly, section 31 of the Competition Act 1998 has only ever referred to Infringement decisions and not Non-Infringement decisions.

[82] CMA 16, 'Prioritisation principles for the CMA' April 2014, which refers to the key criteria:- 'impact', 'strategic significance', 'risk' and 'resource'.

[83] [2002] CAT 6.

[84] See discussion by Bailey D in Rodger Ch 2 'Early Case-Law of the Competition Appeal Tribunal' at pp34-337.

Table 5-Year /Outcome Crosstabulation

		Case Outcomes								
		I and F	I No F	No Grounds for Action Decision	Ex	Comms Accepted	Case Closure-Admin Priorities	No I Decision	NGA-AP	Total
Year	2001	1	0	0	2	0	0	3	0	6
	2002	3	0	0	0	0	0	6	0	9
	2003	4	2	0	0	0	0	5	0	11
	2004	2	1	0	2	0	0	3	0	8
	2005	2	0	0	0	0	0	0	0	2
	2006	4	0	0	0	1	0	0	0	5
	2007	1	0	0	0	0	4	0	2	7
	2008	0	1	0	0	0	1	0	1	3
	2009	2	0	0	0	0	0	0	0	2
	2010	1	0	1	0	0	1	0	0	3
	2011	3	0	1	0	1	2	0	0	7
	2012	1	0	1	0	0	2	0	0	4
	2013	6	1	1	0	0	6	0	0	14
	2014	1	1	1	0	2	0	0	0	5
	2015	2	0	0	0	0	3	0	0	5
	2016	4	0	1	0	0	1	0	0	6
	2017	9	0	1	0	2	2	0	0	14
	2018	3	0	0	0	0	1	0	0	4
Total		49	6	8	4	5	23	17	3	115

The 49 Infringement and Fine Case Outcomes were analysed to seek to ascertain if there were any particular trends in relation to the level of fines imposed. For instance, there is evidence of a considerable upward trajectory in levels of fines imposed by the European Commission under Articles 101 and 102 over the last twenty years.[85] It was hypothesised that we would see a similar trend in relation to fines imposed by the UK competition authorities. The data here focuses on the level of fine originally imposed by the OFT/CMA as at the date of the Case Outcome, irrespective of whether the fine was later reduced or annulled on appeal to the CAT

[85] http://ec.europa.eu/competition/cartels/statistics/statistics.pdf, see in particular the comparison between fines 1990-2004 and 2005-2019. See also for instance https://www.businessinsider.com/the-7-biggest-fines-the-eu-has-ever-imposed-against-giant-corporations-2018-7?r=US&IR=T#2-google-fined-27-billion-in-2017-2.

(and beyond).[86] We have calculated Fines imposed on a yearly basis, after deduction of any leniency or settlement discounts, and aggregated to the nearest £1m. In 3 years this results in a £0 fine total outcome, although only in 2008 (and 2000) were there no Fines imposed at all.[87] The results are set out in Table 6.

Table 6- Fines Per Year

		Fine (To nearest £m)
Year	2001	3
	2002	2
	2003	54
	2004	2
	2005	1
	2006	3
	2007	0
	2008	0
	2009	168
	2010	225
	2011	88
	2012	1
	2013	3
	2014	0
	2015	1
	2016	3
	2017	146
	2018	7
Total		707

These figures on levels of fines imposed are consistent with other aspects of the analysis of the enforcement practice to date:- the fairly busy early period of enforcement and the ratcheting up of fines in two significant RPM cases in 2003 (Replica Kits and Toys and Games) albeit the fines were subsequently reduced on appeal;[88] the existence of a relatively fallow period in the mid-noughties 2004-2008; the period of 'big' cases and increased fines in 2009-2011, and although Construction bid-rigging was a notable success, there were successful

[86] Appeal is possible from the CAT to the Court of Appeal (Court of Session in Scotland) and thereafter to the Supreme Court.

[87] In 2007 and 2014 fines were imposed (£277k and 423k (in 2 separate cases (£53 and £370k)) but the total was rounded down.

[88] See Replica Football Kit, *JJB v OFT*, [2005] CAT 22; Toys and Games, *Argos Ltd & Littlewoods Ltd v OFT*, [2004] CAT 24 and [2005] CAT 13; and *Argos Ltd/Littlewoods Ltd/JJB v OFT* [2006] EWCA Civ. 1318.

appeals in relation to the other 3 cases in that period which led ultimately to significant reductions in the final fines recovered in Construction Recruitment Forum,[89] Tobacco[90] and Dairy.[91] The remainder of the period 2012-2018 essentially confirms two issues- the spike in cases and Infringement (and Fine) findings in 2017; but otherwise the partial focus of the CMA on blatant but fairly localised horizontal cartel-arrangements for which only relatively small fines could be imposed in light of the relevant market affected.[92] A total of £707m in fines has been imposed by the OFT/CMA, an average of £37.2 m per year.

Rule/Outcome

It is particularly noteworthy that of all 49 cases where there was an Infringement and Fine, 43 of those case outcomes (ie 87.8%) concerned anti-competitive agreements. Every one of those findings involved a 'by object agreement',[93] which are inevitably more straightforward cases for authorities to successfully establish an infringement.[94] Those 43 Case Outcomes involved the application of Chapter 1 alone (30) or Chapter I in combination with Article 101 (13). Moreover, an Infringement and Fine outcome constituted 53.8% of all cases where those rules were applied (43/80) and, including the 5 Infringement no Fine cases, 60% of cases where Chapter I/Article 1 were applied resulted in an Infringement finding. Closer analysis of the 48 Infringement findings involving anticompetitive agreements cases reveals 35 horizontal price-fixing, bid-rigging and market sharing cases: including significant clusters of cases related to the construction industry, with 9 Infringement case outcomes in construction and related industries.[95] There has also been considerable focus on resale price arrangements by the UK competition authorities.[96] This is evidenced first by the early cluster of significant RPM infringement rulings under chapter I in 2003, in Hasbro/Lladro/Replica Kits and Toys and Games.[97] Subsequently there were two (problematic) cases in which the OFT applied the hub and spoke theory to arrangements which appeared to combine horizontal and vertical pricing

[89] *Eden Brown Ltd and others v OFT* [2011] CAT 8.
[90] *Imperial Tobacco Group plc and others v OFT* [2011] CAT 41.
[91] *Tesco Stores Ltd and others v OFT* [2012] CAT 31.
[92] See for example https://www.gov.uk/cma-cases/investigation-into-property-sales-and-lettings-and-their-advertising.
[93] See for example, C Zelger '"By Object" restrictions pursuant to Article 101(1) TFEU: a clear matter or a mess…' (2017) European Competition Journal 356-389.
[94] Although some of the Decisions additionally demonstrate anti-competitive effects.
[95] Collusive tendering in relation to contracts for flat-roofing services in the West Midlands and Dessicant supplies/Double Glazing (2004); collusive tendering for mastic asphalt flat-roofing contracts in Scotland and for felt and single ply flat-roofing contracts in the North East of England (2005); flat roof and car park surfacing contracts in England and Scotland and Aluminium double-glazing spacer bars (2006); felt and single ply roofing contracts in Western-Central Scotland (2007); and Construction Industry in England, bid-rigging and Construction Recruitment Forum (2009).
[96] See B Rodger, 'UK: A Licence to Print (Monopoly) Money? *Replica Football Kit* and *Toys and Games*, Resale Price Maintenance and the Competition Act 1998' Chapter 13 in Rodger, B (ed), *Landmark Cases in Competition Law, Around the World in Fourteen Stories*, (Wolters Kluwer, 2013).
[97] Ibid, see https://www.gov.uk/cma-cases?case_type%5B%5D=ca98-and-civil-cartels&closed_date%5Bfrom%5D=&closed_date%5Bto%5D=&page=3.

arrangements in Dairy Retail price initiatives in 2011 and Tobacco in 2010.[98] There has been more recent focus by the CMA (primarily) on online vertical competition concerns in 7 cases either directly involving online resale price maintenance as in a cluster of 4 cases in 2016/17,[99] or where limitations on online advertising were imposed to limit competitive pricing as in 3 cases between 2013-17.[100]

However, over the full period of 19 years there have only been 6 Infringement and Fine decisions in cases in which Chapter II/Article 102 have been applied, and including the one case where there was no fine imposed, this means only 7 of all of 37 cases (18.9%) in which the abuse rules were considered led to an Infringement finding. The Infringement and fine cases under the Chapter II prohibition were in 2001-2003, involving exclusionary pricing strategies:- predatory pricing (twice); excessive pricing and margin squeeze pricing.[101] The 2008 infringement finding under Chapter II in Cardiff Bus, where no fine was imposed, also related to predatory pricing strategies. All 3 Chapter II and Article 102 Infringement findings, in 2010, 2011 and 2017, concerned the pharmaceutical industry. Two of the cases concerned abusive strategies regarding the delay of generic competition[102] whereas the final case, still on appeal, involves a particular concern of the CMA, excessive pricing of pharmaceuticals.[103] Even taking into account the 3 commitments cases involving those abuse of dominance rules, only 27% of abuse investigation cases ended with some form of remedy.

It is also interesting to note that there were Non-Infringement decisions in 11 Chapter II cases alone (52.4% of those cases)[104] compared to only 5 Non-Infringement decisions in Chapter I

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[98] *Tesco Stores Ltd and others v OFT* [2012] CAT 31; *Imperial Tobacco Group plc and others v OFT* [2011] CAT 41. See O Odudu 'Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion' European Competition Journal (2011) 205-242.

[99] Bathroom Fittings Case CE/9857-14, https://www.gov.uk/cma-cases/bathroom-fittings-sector-investigation-into-anti-competitive-practices, Commercial refrigeration Case CE/9856-14, https://www.gov.uk/cma-cases/commercial-catering-sector-investigation-into-anti-competitive-practices, and Posters and frames, Case 50223, https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products (2016); and Light Fittings, Case 50343, https://www.gov.uk/cma-cases/light-fittings-sector-anti-competitive-practices (2017).

[100] Roma Mobility Scooters (2013) and Pride Mobility Scooters (2014) Case CE/9578-12, https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector and Ping golf equipment, Case 50230, https://www.gov.uk/cma-cases/sports-equipment-sector-anti-competitive-practices (2017).

[101] In Napp Pharmaceutical Holdings CA98/2D/2001, https://www.gov.uk/cma-cases/napp-pharmaceutical-holdings-ltd-alleged-abuse-of-a-dominant-position (predatory and excessive pricing, 2001); Aberdeen Journals Ltd, CA98/14/2002, https://www.gov.uk/cma-cases/aberdeen-journals-ltd-alleged-abuse-of-a-dominant-position (predatory pricing, 2002) and Genzyme Ltd, CA98/3/03, https://www.gov.uk/cma-cases/genzyme-ltd-alleged-abuse-of-a-dominant-position (margin squeeze pricing, 2003).

[102] Paroxetine Case CE/9531-11, https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-pharmaceutical-sector (2010) and Reckitt Benckiser Case CE/8931/08, https://www.gov.uk/cma-cases/reckitt-benckiser-alleged-abuse-of-a-dominant-position (2011).

[103] Phenytoin sodium capsules, Case CE/9742-13, https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products (2017).

[104] These were all in the period 2001-2004, Consignia plc and Postal Preference Service Ltd; and ICL/Synstar (Though see also a combined Chap I and II case- Dixons Store Group Ltd) (2001) all supra;

cases (10%)[105] though the statistics for case closures on grounds of administrative priorities is broadly similar for agreements and abuse cases. (19.5% and 28.6%). In relation to Chapter I, the Non-Infringement decisions related to :- a notification of standard licensing conditions by the Film Distributors' Association Ltd (2002);[106] Rules set out by the General Insurance Standards Council (2002);[107] notification of a vertical arrangement by Lucite International Ltd (2002);[108] Elite Greenhouses Ltd (2003) where there was no agreement to fix prices,[109] and Anaesthetists' Groups (2003).[110] It should be noted that one of the 11 Chapter II Non-Infringement Case Outcomes was overturned by the CAT, which itself provided an infringement finding in an appeal in relation to the Harwood Park Crematorium.[111] These statistics in relation to abuse cases appear to demonstrate: a historical reluctance by the competition authority to undertake abuse cases (or for complaints to be made) and the

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North and West Belfast Health and Social Services Trust CA98/11/2002, https://www.gov.uk/cma-cases/n-w-belfast-health-and-social-services-trust-purchase-of-care-services; Companies House Case CP/1139-01, https://www.gov.uk/cma-cases/companies-house-alleged-abuse-of-a-dominant-position; Association of British Travel Agents and British Airways CA98/19/2002, https://www.gov.uk/cma-cases/british-airways-reduction-of-booking-payments-to-travel-agents-for-short-haul-flights (2002) (note also Supply of Oil Fuels 2002, https://www.gov.uk/cma-cases/supply-of-oil-fuels-in-an-emergency-memorandum-of-understanding, though formally coded as an Exemption, was also held to be no abuse under Chap II); BskyB CA98/20/2002, https://www.gov.uk/cma-cases/bskyb-investigation-into-alleged-abuse-of-a-dominant-position; Du PontCA98/07/03 https://www.gov.uk/cma-cases/du-pont-refusal-to-supply-of-unprocessed-holographic-photopolymer-film; BetterCare, CA98/09/2003, https://www.gov.uk/cma-cases/n-w-belfast-health-and-social-services-trust-competition-investigation (2003) (dealt with separately as a remitted case under a different webpage on CMA case site from the earlier 2002 decision); First Edinburgh/Lothian, CA98/05/2004, https://www.gov.uk/cma-cases/first-edinburgh-bus-fares-alleged-abuse-of-a-dominant-position; Harwood Park Crematorium, CA98/06/2004 https://www.gov.uk/cma-cases/harwood-park-crematorium-refusal-of-access-to-jj-burgess-sons-ltd; TM Property/MacDonald Dettwiler (Hub) Ltd, CA98/07/2004, https://www.gov.uk/cma-cases/tm-property-macdonald-dettwiler-alleged-abuse-of-a-dominant-position (2004)

[105] See infra.

[106] CA98/10/2002, https://www.gov.uk/cma-cases/film-distributors-association-ltd-competition-in-the-exhibition-of-films.

[107] CA98/16/2002, https://www.gov.uk/cma-cases/general-insurance-standards-council-investigation-into-anti-competitive-practices.

This decision follows a judgment of the Competition Commission Appeal Tribunal (the CCAT) in September 2001 which set aside a previous non-infringement decision by the Director. The CCAT found that the Rules, in particular Rule F42, which required GISC members to deal only with intermediaries who were also regulated by GISC, had the object and effect of restricting competition to an appreciable extent in breach of the Chapter I prohibition. Subsequently GISC dropped Rule F42 and, as a result, the Director has now concluded that the remaining Rules no longer infringe the Chapter I prohibition.

[108] CA98/17/02, https://www.gov.uk/cma-cases/lucite-international-uk-ltd-basf-plc-investigation-into-anti-competitive-practices; where vertical agreements were at that stage excluded by the chapter I prohibition.

[109] Case CP/1709-02, https://www.gov.uk/cma-cases/elite-greenhouses-ltd-alleged-price-fixing-agreements.

[110] 15/04/2003, https://www.gov.uk/cma-cases/anaesthetists-groups-investigation-into-anti-competitive-agreements.

[111] *JJ Burgess & Sons v OFT*, [2005] CAT 25.

difficulties in pursuing a case through to an Infringement finding. Nonetheless, it would be impossible on the basis of this research to criticise the OFT/CMA for having adopted a limited approach to the interpretation of the abuse prohibition which may not be in line with existing European Court jurisprudence.[112] It also needs to be borne in mind that abuse cases are incredibly resource intensive, requiring a rigorous and economically tested market definition analysis. Furthermore proving certain abusive strategies, such as pricing abuses, may involve sophisticated financial analysis and considerable specialist resources, and these difficulties can be compared with the relatively straightforward task where there is some evidence (particularly through leniency) of the existence of a by object arrangement.

In relation to the application of the EU law rules, there was only one case involving EU law alone (Article 102) and it was resolved informally (AP), and of the other 41 cases where the EU rule(s) was applied together with the domestic prohibition(s), 16 resulted in an Infringement (and Fine) finding. Accordingly, there have been 16 formal Infringement decisions involving EU law by the OFT/CMA since Regulation 1/2003 came into force.

Table 7-Rule /Outcome Crosstabulation

		Case Outcomes								
		I and F	I no F	NGA	Ex	Commitments Accepted	Case Closure-Admin Priorities	No I	NGA-AP	Total
Rule	Chapter I	30	5	0	3	1	5	5	1	50
	Chapter II	3	1	1	0	2	3	11	0	21
	Chapter I and II	0	0	0	1	0	0	1	0	2
	Article 102	0	0	0	0	0	1	0	0	1
	Chapter I and Article 101	13	0	4	0	1	10	0	0	27
	Chapter II and Article 102	3	0	3	0	1	4	0	2	13
	Chapters I, II and Articles 101,102	0	0	0	0	1	0	0	0	1
Total		50	6	8	4	5	23	17	3	115

RELEVANT GEOGRAPHICAL MARKET AND AFFECTING INTER-STATE TRADE

This section will discuss the consideration by the UK competition authorities of the relevant geographical market ('RGM') covered by the alleged infringement and the extent to which that infringement has affected inter-state trade ('AIST'), such that the authority was also

[112] See for instance Nazzini, R *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* OUP 2012.

required to apply the relevant EU law provision. The affecting inter-state trade criterion or test essentially delimits the substantive threshold of the application of the EU competition law rules.[113] The RGM is a separate, related,[114] geographical concept which is used to define the geographical scope of the alleged infringement investigated by the competition authorities. At the outset it should be noted that for many of the Case Outcomes there was no formal discussion of either the RGM or the AIST, in some instances where there was a No Grounds of Action Decision and in particular in Case Closure Summaries based on administrative priorities from 2007 onwards. Furthermore, inevitably there was no consideration of the EU prohibitions by the OFT for alleged infringements prior to the entry into force of Regulation 1 on May 1, 2004.

Article 5(1) of Regulation 1 provides :-'The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. ' Article 3(1) requires NCAs to apply Articles 101 or 102 where they are applying national law and there is an AIST. Furthermore, Regulation 1, in conjunction with the Commission's Network Notice,[115] envisage co-operation between Member States in enforcing the EU rules. Indeed the Network specifically addresses the possibilities here, primarily on geographic criteria, of NCA's working together in enforcement in relation to the same infringement, or multiple NCAs co-operating with a particular NCA taking the primary enforcement role.[116] Given this background to the import of geographic factors, we will examine the OFT and CMA's practice in relation to identifying the RGM and AIST and its application of the EU rules.

Localised Markets

The Competition Act 1998 Chapter I and II prohibitions, though modelled substantively on Articles 101 and 102,[117] are different in one material respect- the requirement only for UK trade to be affected as opposed to inter-state trade. This effectively meant that business behaviour could be prohibited and fined regardless of any impact on EU trade- consequently the domestic prohibitions could potentially affect considerably more businesses engaging in alleged anti-competitive behaviour. The potential application across the panoply of business organisations in the UK was one of the reasons for the delay in entry into force of the Competition Act prohibitions for over 15 months to 1 March 2000, to allow the OFT to undertake a significant campaign of awareness and compliance education.[118] The idea was

[113] See further infra; see *Wyatt and Dashwood's European Union Law*, 6th edn, Hart Publishing, 2011, pp653-654; A Jones and B Sufrin, *EU Competition Law, Text, Cases and Materials,* OUP, 2016,6th edn Ch3, 5E.

[114] See Commission 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty', [2004] OJ C101/81, para 22.

[115] Commission Notice on cooperation within the Network of Competition Authorities, Official Journal 2004 C 101, p. 43-53.

[116] Ibid.

[117] See s60 of the Competition Act 1998. , B Rayment, 'The Consistency Principle : Section 60 of the Competition Act 1998', Chapter 4 in *Ten Years of UK Competition Law Reform*, (Rodger ed.) (DUP, 2010).

[118] Rodger, B "Compliance with Competition Law; A View from Industry" [2000] Commercial Liability Law Review 249.

that competition law no longer only affected major multinationals and businesses engaged in international trade but could also now be applied to the business practices of smaller businesses operating on a smaller and more local scale which affected consumers directly. From policy statements to enforcement practice, one can clearly identify the CMA's two-pronged strategy to deal with 'cases large and small', emphasising the ongoing strategic importance of undertaking small-scale localised cases where there is real impact on local consumers.[119] The potential application of the new prohibitions to localised markets was demonstrated first in Arriva plc/First Group plc in 2002, where there was an Infringement finding and fine imposed in relation to market-sharing in relation to a single bus route in Leeds.[120] There have been numerous examples since of narrowly defined geographic markets in which the alleged anti-competitive behaviour has been investigated:- Aberdeen Journals (2004) where the market was the Aberdeen area;[121] 2004, First Edinburgh/Lothian involving bus services in the Greater Edinburgh area;[122] and Burgess crematorium/funeral services (2004) in relation to the Stevenage area.[123]

In various construction industry related cases, the RGM was more or less defined in the case name:- Collusive tendering in relation to contracts for flat-roofing services in the West Midlands (2005);[124] Collusive tendering for mastic asphalt flat-roofing contracts in Scotland (2005),[125] and Collusive tendering for felt and single ply flat-roofing contracts in the North East of England;[126] flat roof and car park surfacing contracts in England and Scotland (2006),[127] Felt and single ply roofing contracts in Western-Central Scotland: anti-competitive practices (2007).[128]

The prevalence of investigations into localised markets is certainly not confined to construction markets and there have been a number of cases with localised RGM:- Associated

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[119] See for instance, Michael Grenfell on the CMA's approach to competition enforcement, 12 nov 2015, https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-approach-to-competition-enforcement; Sarah Cardell speaks about the CMA's enforcement priorities and approach, 23 February 2016, https://www.gov.uk/government/speeches/sarah-cardell-speaks-about-the-cmas-enforcement-priorities-and-approach.

[120] https://www.gov.uk/cma-cases/arriva-plc-and-firstgroup-market-sharing-agreement-for-bus-routes.

[121] https://www.gov.uk/cma-cases/aberdeen-journals-ltd-alleged-abuse-of-a-dominant-position.

[122] Though there was no finalised view on the RPM; https://www.gov.uk/cma-cases/first-edinburgh-bus-fares-alleged-abuse-of-a-dominant-position.

[123] https://www.gov.uk/cma-cases/harwood-park-crematorium-refusal-of-access-to-jj-burgess-sons-ltd.

[124] https://www.gov.uk/cma-cases/flat-roofing-contracts-in-the-west-midlands-collusive-tendering.

[125] https://www.gov.uk/cma-cases/mastic-asphalt-flat-roofing-contracts-in-scotland-investigation-into-collusion.

[126] https://www.gov.uk/cma-cases/felt-and-single-ply-flat-roofing-contracts-in-the-north-east-of-england-anti-competitive-practices.

[127] https://www.gov.uk/cma-cases/flat-roof-and-car-park-surfacing-contracts-in-england-and-scotland-anti-competitive-practices.

[128] https://www.gov.uk/cma-cases/felt-and-single-ply-roofing-contracts-in-western-central-scotland-anti-competitive-practices.

Newspapers, focused on London,[129] Scottish Dairies[130] where there was no explicit discussion of the RGM but it was clearly confined to Scotland; and Cardiff Bus, involving an abuse of a dominant position in commercial and tendered bus services together with urban train services on the relevant routes in the Cardiff County area,[131] all in 2008. Sometimes the RGM can be limited to considerable parts of the UK as in the 5 decisions in relation to Mercedes Benz in relation to areas in the North of England and parts of Wales and Scotland, in 2013.[132] However, the consideration of very localised market infringements continues as demonstrated in 2015 in Estate Agency services where the market comprised a 5 mile radius from Fleet;[133] and in residential estate agency services in 2015.[134] The continued impact and potential application of the domestic prohibitions where the EU rules would certainly not be applicable is exemplified by the most recent CMA Case Outcome, Facilities at Airports,[135] in 2018 which concerned the provision of car parking services at Heathrow Terminal 5.

UK and Wider Markets

Nonetheless, the authorities have often considered the extent to which the relevant market may be broader than the UK even before the requirement to consider the potential application of the EU prohibitions. For instance in 2001, in Dixons, the RGM was 'at least as broad as UK but likely to be broader'.[136] Though commonly, as in Napp,[137] the market is defined as not wider than the UK market, there has, even pre-Regulation 1, been broader relevant market definitions, for example :- 'the relevant market for the purposes of this decision is likely to be the market for the manufacture and supply of unprocessed HPF worldwide' .[138] More commonly the OFT specifically excluded foreign markets from the scope

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[129] https://www.gov.uk/cma-cases/associated-newspapers-ltd-alleged-abuse-of-a-dominant-position.

[130] https://www.gov.uk/cma-cases/scottish-dairies-chapter-i-investigation-into-price-fixing-and-market-sharing.

[131] https://www.gov.uk/cma-cases/cardiff-bus-alleged-abuse-of-a-dominant-position.

[132] https://www.gov.uk/cma-cases/mercedes-benz-distribution-of-commercial-vehicles-trucks-and-vans.

[133] https://www.gov.uk/cma-cases/investigation-into-property-sales-and-lettings-and-their-advertising, see Decision at para 5.137:- 'The CMA has found that the nature of estate and lettings agency services in the Three Counties Area is inherently local'.

[134] https://www.gov.uk/cma-cases/provision-of-residential-estate-agency-services.

[135] https://www.gov.uk/cma-cases/conduct-in-the-transport-sector-facilities-at-airports.

[136] https://www.gov.uk/cma-cases/dsg-retail-compaq-computer-packard-bell-nec-complaint-about-exclusive-agreements at para 60.

[137] https://www.gov.uk/cma-cases/napp-pharmaceutical-holdings-ltd-alleged-abuse-of-a-dominant-position.

[138] Refusal to supply unprocessed holographic photopolymer film: E.I. du Pont 2003, https://www.gov.uk/cma-cases/du-pont-refusal-to-supply-of-unprocessed-holographic-photopolymer-film at para 23.

of the RGM, as for instance in 2004 in AtTheRaces,[139] and in Supply of Dessicant[140] as follows:- "42. There seems to be little or no difference between desiccant used in the IG industry in the UK and that used abroad. We understand that it is possible for UK manufacturers of IG units to source desiccant directly from outside the UK. However, we also understand that this does not occur in practice at present, and is unlikely to occur in the immediate future. The European market is characterised by small numbers of large suppliers of IG components and small numbers of large IG unit manufacturers. In contrast, the UK market is characterised by large numbers of small or medium IG manufacturers which are served by a network of distributors of IG components. 43..in particular for the purpose of assessing the level of penalties, the OFT considers that the relevant market is desiccant supplied through distributors for use in IG units in the UK."[141]

In a series of pharmaceutical cases, the OFT/CMA has specifically limited the RGM on a national basis, for instance in 2011, in Reckitt Benckeser, the OFT noted that:- 'In previous cases in the pharmaceutical sector the relevant geographic market has been defined as national in scope.'[142] It continued at 4.171 ' … definition of national markets is typically appropriate because of differences in the regulatory schemes for authorising and reimbursing medicines across countries, in the marketing strategies used by pharmaceutical companies, in doctors' prescribing practices and in prices. All of these factors apply in this case. The OFT therefore finds that the relevant geographic market is national (UK-wide) in this case.' The same conclusion was reached in Paroxetine in 2010,[143] and more recently in Phenytoin Sodium Capsules in 2017.[144]

The affecting Inter-State Trade doctrine and the Application of the EU Law Prohibitions

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[139] https://www.gov.uk/cma-cases/attheraces-investigation-into-collective-selling-of-media-rights, Para 175:- 'rights to foreign racing are not a close substitute (as the Non-LBO Bookmaking Rights relate to British horseraces only). In addition, the manner in which rights are sold means that rights holders (racecourses) can charge different prices to UK and overseas bookmakers. As a result the behaviour of overseas bookmakers will not constrain the price charged to UK non-LBO bookmakers for sound and pictures of British horseraces. 176. Insofar as the OFT need identify a RGM, that it is the UK, with regard to the Non-LBO Bookmaking Rights'.

[140] Agreement between UOP Limited, UKae Limited, Thermoseal Supplies Ltd, Double Quick Supplyline Ltd and Double Glazing Supplies Ltd to fix and/or maintain prices for desiccant, https://www.gov.uk/cma-cases/uop-desiccant-price-fixing-investigation.

[141] See also 2006, (Agreement to fix prices and share the market for aluminium double glazing spacer bars) https://www.gov.uk/cma-cases/aluminium-double-glazing-spacer-bars-anti-competitive-agreements-practices at para 187:-' good reason to conclude that the geographic market extends at least to the UK, and that this is the narrowest possible geographic market definition 189- Although it is possible that the market… may extend beyond the UK, the OFT considers that there are a number of factors that suggest that at the moment the market is national.'

[142] https://www.gov.uk/cma-cases/reckitt-benckiser-alleged-abuse-of-a-dominant-position, at para 4.170.

[143] https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-pharmaceutical-sector.

[144] https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products at paras 4.186-4.187.

The prerequisite for Articles 101 and 102 that any alleged competition law infringement must affect trade between Member States acts as a jurisdictional test to demarcate the boundary between the application of EU and national competition law. The relationship between EU and domestic competition law is now governed by Art 3 of Reg 1/2003.[145] Article 3(1) provides that inter--state trade is affected, national courts and authorities shall, in applying domestic competition law rules, also apply Arts 101 and 102. EU Courts have given the inter-state trade concept a broad interpretation. The general test, which applies to cases under Arts 102 and 101 TFEU, was laid down in *Société Technique Minière*:[1]

> it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.[146]

The affecting inter-state trade test, therefore, covers any conduct which could affect the way in which trade patterns operate across the EU.[147]

The first detailed analysis of the AIST doctrine took place in 2009 in the construction industry in England bid-rigging case.[148] The RGM was England, and the OFT considered that there was no AIST and consequently no duty to apply art 101:- 'V.22. The OFT has not uncovered any evidence that the bid rigging activities of the Parties in the UK have had an actual exclusionary effect on competitors from other Member States. Furthermore, based upon the above evidence of the low demand in the UK for construction undertakings from other Member States'.[149]

The first case in which EU law was applied was in 2011 in OFT by the OFT in Loan products to professional Service Firms.[150] Although the RGM was deemed not to be wider than the UK, the arrangements satisfied the AIST test:- 'As set out in paragraphs 22 to 23 above, the Parties' customers have international aspects to their businesses. Many have offices in other Member States or have clients who are based in other Member States. Debt finance is sometimes sought from banks by UK-based Large Professional Service Firms for use outside the UK..'[151] As noted above, the RGM in various pharmaceuticals cases has been drawn on national lines, but as Reckitt Benckeser demonstrates this certainly does not preclude a finding that there is an AIST and that the EU law prohibitions apply:- 'The main competitor affected by RB's alleged abuse is Pinewood (see paragraph 2.11 above) which is based in Ireland. Consequently, even

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[145] Regulation 1/2003/EC, OJ 2003, L1/1.

[146] Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235. See also the Commission 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty', [2004] OJ C101/81.

[147] See, also, Case C-359/01P *British Sugar v Commission* [2004] ECR I-4933.

[148] https://www.gov.uk/cma-cases/construction-industry-in-england-bid-rigging.

[149] See the similar discussion and outcome in relation to Construction Recruitment Forum, also 2009, https://www.gov.uk/cma-cases/construction-recruitment-forum-collective-boycott-and-price-fixing at para 4.394

[150] https://www.gov.uk/cma-cases/loan-products-to-professional-service-firms-investigation-into-anti-competitive-practices

[151] Ibid, as discussed at paras 332-342 eg para 338.

though the alleged abuse only covers the UK, the patterns of trade between Member States (such as between the UK and Ireland) are at the very least potentially affected and therefore, RB's alleged conduct may affect trade between Member States.'[152] EU law was also considered applicable in 2015, in the ophthalmology sector where the CMA found that the infringements were 'capable of leading to a change in the number of UK patients seeking ophthalmic treatment abroad and to the number of EU patients seeking such treatment in the UK.'[153]

However, even in certain cases where the RGM has been determined to be UK-wide, the OFT/CMA has considered that there has been no AIST, despite the EU jurisprudence and Commission Guidelines clarifying that the test can be satisfied in national or even sub-national markets.[154] For instance in two related cases involving mobility scooters in 2013/2014 (Roma and Pride)[155] sales to UK retailers were deemed not to be cross-border in nature. In both it was inferred that the 'Retailers make no, or no material, sales to end-consumers in other Member States as mobility scooters are not easily traded across borders..' and accordingly Article 101 was not applicable.[156]

Online Cases and the RGM/AIST

As noted in the analysis of the Case Outcomes there has been a number of online RPM-related cases in 2016-17. The AIST test is generally easily satisfied in relation to online trade and services, as demonstrated generally by that series of cases. In the Bathroom fitting sector case, it was considered that the AIST test was satisfied where 'the Agreements involve RPM and cover products that are supplied throughout the whole of the UK'[157] and 'the products that are the subject of the Agreements are easily traded across borders as there a no significant cross-border barriers, in particular when sold through resellers online'.[158] In particular it was noted that 'the Agreements relate to online commerce, which, by its nature, is likely to reach consumers in other EU Member States'.[159] In the Commercial Refrigeration

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[152] https://www.gov.uk/cma-cases/reckitt-benckiser-alleged-abuse-of-a-dominant-position at paras 7.2-7.5 in particular at para 7.3. See also for instance Airline passenger fuel surcharges on long haul flights: price-fixing (2012) https://www.gov.uk/cma-cases/airline-passenger-fuel-surcharges-on-long-haul-flights-price-fixing at para 404.

[153] https://www.gov.uk/cma-cases/conduct-in-the-healthcare-sector at Paras 4113-4128, in particular para. 4.124.

[154] See the Commission 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty', [2004] OJ C101/81.

[155] https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector.

[156] See also for instance re supply of prescription medicines to care homes in England (2014), https://www.gov.uk/cma-cases/investigation-into-the-supply-of-healthcare-products where the RGM was national, but there was no AIST, as per para 6.149, the conduct was not 'ross-border in nature, but rather took place in limited areas within the UK.

[157] https://www.gov.uk/cma-cases/bathroom-fittings-sector-investigation-into-anti-competitive-practices at para 6.75.1

[158] Ibid. at para. 6.75.2

[159] Ibid. at para. 6.75.3

Sector case,[160] the AIST test was considered and EU law applicable on the following basis:-' 6.71.1 The Agreements involve RPM in respect of tradeable products which cover at least the whole of the UK. 6.71.2 There are meaningful amounts of imports and exports of commercial refrigeration products at the wholesale level, including to and from the rest of the EU. For example, Foster itself had [%] of exports in 2012, [%] in 2013 and almost [%] in 2014 (including exports to France and Germany).466 6.71.3 A number of Foster's competitors in the UK are subsidiaries of companies based in other EU Member States, eg [Supplier]. 6.71.4 There is evidence that certain resellers have the facility to sell commercial refrigeration products to overseas customers..'

The case which is distinctive here is Posters and Frames,[161] where only the Chapter I prohibition was applicable:- 'Given that the relevant product markets concern sales on Amazon UK and do not extend to any other online retail platforms, it is not necessary to consider further whether online retailers on Amazon UK face competition from non-UK online retailers for sales to consumers in the UK.'[162] As in earlier cases, in furniture industry wraps (2017),[163] Chapter I and Article 101 were applicable due to international aspects of the trade and certain other Member States markets were specifically mentioned in that context as follows:- 'As noted above, horizontal cartels extending over the whole of a Member State are normally capable of affecting trade between Member States. 5.69 In addition, there are international aspects to the supply of drawer wraps. It is noted, in particular, that during the Relevant Period, TATL supplied drawer wraps in single components to the Republic of Ireland; that BHK UK supplied products to its German parent company in a limited set of circumstances; and that there was at least some, albeit limited, competition from a number of non-UK businesses, including from companies in Belgium and Denmark.'[164] The position was similar in the related case of Drawer fronts,[165] although the supply to the Republic of Ireland only was specifically mentioned.[166]

The most recent case was in relation to the Light fittings sector in 2017, where the CMA dealt with the AIST issue in an identical way to the Bathroom fitting case, in particular highlighting that:- 'The Agreements related to online commerce which, by its nature, is likely to reach consumers in other EU Member States' and specifically referring to the fact that one party's

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[160] https://www.gov.uk/cma-cases/commercial-catering-sector-investigation-into-anti-competitive-practices.

[161] https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products.

[162] Ibid Case 50223 at para 4.21.

[163] Case CE/9882-16, https://assets.publishing.service.gov.uk/media/592ea4f3ed915d20fb000122/non-conf-decision-drawer-wraps.pdf.

[164] Ibid. at para. 5.68.

[165] Case CE/9882-16, https://assets.publishing.service.gov.uk/media/592ea50440f0b63e0b00013e/non-conf-decision-drawer_fronts.pdf.

[166] Ibid. at para. 5.72.

lighting business extended to at least two other Member States, Germany and Ireland, due to its shareholdings in business there.[167]

Apparent dissonance in approach to RGM/AIST

Although identification of the RGM and the AIST serve related purposes, it is clear, and explicit that the OFT/CMA have adopted a conservative approach to the identification of the RGM- adopting a narrow interpretation, and in all cases recognising (at most) a UK market, and noting that this is ascertained for the purposes of quantifying the fine- based on the affected markets. Nonetheless there appears to be dissonance in the approach to identification of the RGM and the related (albeit differentiated) issue of whether the AIST test has been satisfied. This is demonstrated clearly by all of the online cases discussed above, where the 'cautious approach' to determining the relevant turnover for fines by limiting the scope of the RGM as the UK,[168] can be contrasted with the conclusion that AIST test was satisfied. Similarly in 2017, in the Ping golf online sales ban case, despite factors indicating cross-EU competition, the market was not drawn wider than the UK,[169] but on the basis of potential impact, trade, consumers, market shares abroad, scope of the ban etc. with various countries mentioned, the AIST test was satisfied.[170] The contrast in approach to the two issues is exemplified in the pharmaceuticals cases, where the RGM was identified narrowly as the UK, but the AIST test was satisfied for instance on the basis of the consequent absence of parallel imports in Paroxetine.[171] The conservative approach to determining the RGM is again demonstrated in 2017, in Supply of Galvanised Steel Tanks for water storage: civil investigation (the 'Main Cartel Decision'), and the discussion on the AIST:- 'exported CGSTs to other countries in Europe, including the Republic of Ireland, and beyond. There is also some evidence that customers in the Republic of Ireland may have been included in the customer allocation arrangements which formed part of the cartel, as set out at paragraph 2.34 above.'[172] The international aspects to the trade were clearly evidenced in conduct in the Modelling sector,

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[167] Case 50343, https://assets.publishing.service.gov.uk/media/5948dc48e5274a5e4e00028c/light-fittings-non-confidential-decision.pdf at para. 4.166

[168] See Bathroom Fittings, Case CE/9857-14, https://assets.publishing.service.gov.uk/media/573b150740f0b6155b00000a/bathroom-fittings-sector-non-conf-decision.pdf at B-19. See also for instance, 2017 furniture industry wraps, supra at paras 3.18-3.23; and Commercial Refrigeration sector, supra at B26-28.

[169] Supra, https://assets.publishing.service.gov.uk/media/5a3b7d11e5274a73593a0ce5/sports-equipment-non-confidential-infringement-decision.pdf, Paras 3.136-3.139, particularly at para. 3.139.

[170] Ibid at para. 4.182.

[171] Supra, https://assets.publishing.service.gov.uk/media/57aaf65be5274a0f6c000054/ce9531-11-paroxetine-decision.pdf at para. 10.24- ' the existence of parallel traders across the sector. As described at paragraph 3.392, after entry by the Generic Companies selling GSK paroxetine (including through the GUK-GSK Agreement), sales of parallel imported paroxetine fell to virtually nothing.' See also Phenytoin sodium capsules in the UK, https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products.

[172] Supra, https://assets.publishing.service.gov.uk/media/58db91e440f0b606e3000046/ce-9691-12-main-cartel-decision.pdf at paras 4.37-4.38.

2017,[173] where in assessing the AIST,[174] considerable cross border issues were raised - 'Model agencies also engage in cross-border activity by establishing (or acquiring) businesses and having a common brand identity across borders…'[175] though the RGM was again defined as the UK.

Cross Border Cases and Co-operation

Despite the clear reference to international aspects of the trade involved in some of these cases where EU law has been applied, particularly latterly by the CMA, the RGM has been confined to the UK, and indeed there is no evidence of co-operation or a shared approach to the enforcement of the prohibitions with external competition authorities, notably for instance the Irish competition authority. Indeed, the only cases where there has been reference to external enforcement of the rules and co-operation, has been in relation to E-books (2011), Commercial Vehicles (2012), interchange Fees (Mastercard and Visa) (2015), the Hotel online Booking Investigation and Modelling Sector (2017). In the former two, OFT in closing its file on the grounds of administrative priorities noted its co-operation with the ongoing inquiry by the Commission,[176] whereas Interchange Fees was closed similarly in the context of a complicated set of EU enforcement and legislative processes.[177] Hotel online Booking Investigation,[178] made reference to investigations by other NCAs which again led to the case being closed on an AP basis. The only other explicit reference to co-operation ('liaison') arose in the Modelling Sector where the French and Italian markets were considered to constitute distinct and separate infringements. There is very little evidence of international cross-border enforcement by the CMA together with or leading other NCAs of the type envisaged originally by the Commission in its Network Notice for cases below the 'more than three Member State threshold' which would make the Commission the well-placed authority.

COMMISSION STATISTICS ON ECN ENFORCEMENT OF THE EU PROHIBITIONS

[173] Supra, https://assets.publishing.service.gov.uk/media/58d8eb1840f0b606e7000030/modelling-sector-infringement-decision.pdf.
[174] Ibid. at paras 4.127-4.156
[175] See para. 4.137.
[176] https://www.gov.uk/cma-cases/e-books-investigation-into-anti-competitive-arrangements-between-some-publishers-and-retailers and https://www.gov.uk/cma-cases/commercial-vehicle-manufacturers-civil-cartel-investigation.
[177] https://www.gov.uk/cma-cases/investigation-into-interchange-fees-mastercard-visa-mifs.
[178] https://www.gov.uk/cma-cases/hotel-online-booking-sector-investigation.

To put the CMA's enforcement strategy and practice and record of EU competition law enforcement in context, it is helpful to look at the relevant information provided by the European Commission on the enforcement of the EU competition law prohibitions within the ECN by the Commission and Member State National Competition Authorities. The following Tables are drawn from DG Competition's website.[179]

1. Aggregate figures on antitrust cases

	Total Year 2004	*Total Year 2005*	*Total Year 2006*	*Total year 2007*	*Total year 2008*	*Total year 2009*	*Total year 2010*	*Total Year 2011*	*Total Year 2012*	*Total Year 2013*	*Total Year 2014*	*Total Year 2015*	*Total Year 2016*	*Total Year 2017*
Total number of case investigations of which the Network has been informed [1)]	301	203	165	150	159	150	169	163	110	120	196	179	145	151
- of which COM cases	101	22	21	10	10	21	11	26	6	5	23	43	18	29
- of which NCA cases	200	181	144	140	149	129	158	137	104	115	173	136	127	122
Cases in which an envisaged decision has been submitted by NCAs during the	32	76	64	72	60	70	94	82	85	48	101	94	77	80

[179] http://ec.europa.eu/competition/ecn/statistics.html.

period indicated [2]														

[1] Case investigations started whether by a National Competition Authority (NCA) or by the Commission.
[2] Cases having reached the envisaged decision stage; only submissions from the NCAs under Article 11(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

2. More detailed figures on antitrust cases

1st May 2004 – 31st December 2017

Investigations into cases of which the Network has been informed [3]	2361
Cases in which an envisaged decision has been submitted by NCAs [4]	1031

Cases per Member State:

Member State	New Cases	Envisaged Decision - 11 (4)	Envisage Decision - 11 (5)	Closed Cases	Total
Austria	114	36		100	**250**
Belgium	67	18	1	23	**109**
Bulgaria	25	8		15	**48**
Croatia	6	2		4	**12**
Cyprus	22	7		10	**39**
Czech Republic	28	15		6	**49**
Denmark	86	58	3	79	**226**
Germany	222	116	9	121	**468**

Greece	54	46		37	**137**
Estonia	9	4		8	**21**
Finland	35	17	3	28	**83**
France	267	136	14	213	**630**
Hungary	130	43	2	112	**287**
Ireland	21	2	1	11	**35**
Italy	166	135	6	139	**446**
Latvia	19	5		18	**42**
Lithuania	25	17	1	19	**62**
Luxembourg	25	7	1	10	**43**
Malta	5	3		2	**10**
The Netherlands	110	54	1	78	**243**
Poland	30	14	2	26	**72**
Portugal	82	28	1	66	**177**
Romania	68	41	7	31	**147**
Slovakia	36	27	1	19	**83**
Slovenia	37	24	1	23	**85**
Spain	153	114		21	**288**
Sweden	71	25		63	**159**
United Kingdom	100	29	5	57	**191**
European Commission	348	97	7	133	**585**

Total	**2361**	**1128**	**66**	**1472**	**5027**

Although the method of calculating numbers of cases for the Commission statistical purposes differs from the methodology adopted for the purposes of the current research,[180] the most important aspects here, aside generally from the important complementary task which these statistics would suggest is being undertaken by NCAs, would appear to be the data on envisaged decisions under Articles 11(4) and 11(5) of Regulation 1, which provide as follows:-

> 4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.
>
> 5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

The figures on Article 11(4) decisions are of more significance in this context as indicating decisions to be taken by an NCA in applying the EU law prohibitions. The enforcement record of the UK authorities, with 29 Article 11(4) envisaged decisions, is disappointing, particularly in light of the CMA's budget and resources[181] and relative to the EU competition law enforcement record of other Member State NCAs such as France, Germany, Italy and Spain in particular. Unlike the criticism of certain Member States' competition authorities,[182] the concern here is not that CMA adopts a narrow interpretation of the AIST test.[183] However, there is an argument, at least until recently and reflected by the relative enforcement statistics produced by the Commission, particularly given the CMA's budget, that there may have been under-enforcement of the EU competition rules. Moreover it is clear that the OFT and CMA have focused on local, the UK at widest, impact of alleged competition law infringements. However, as noted by Monti in the context of the NCA+ Directive,[184] this is not

[180] See discussion supra.

[181] See OFT/CMA Annual Plan.

[182] See Botta M, Svetlicinii,A and Bernatt, M, 'The Assessment of the Effect on Trade by the National Competition Authorities of the "New" Member States: Another Legal Partition of the Internal Market?' (2015) CMLRev 1247-1276.

[183] Note discussion supra.

[184] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market; See Monti, G, 'Editorial- Strengthening National Competition Authorities' Comp L. Rev 13(2) 103-107; see also Botta, M 'The draft Directive on the powers of national competition authorities: the glass half empty and half full' [2017] ECLR 470-477.

a phenomenon limited to the UK:- 'Moreover, the Directive does little to align the work of NCAs: the status quo of NCAs taking local cases and the Commission handling disputes that cross borders remains in place. If so, one has to wonder why any alignment of NCAs (even that achieved by Regulation 1) was necessary since national authorities take national cases and could well do so under national law. The rationale appears to be that unless all Member States enforce competition law with the same intensity then those States who under-enforce the law could confer an advantage to 'their' firms who would have a reduced regulatory burden. However if this is the concern that the Commission has it is not clear how a Directive codifying certain procedural aspects serves to achieve greater enforcement by laggards.'[185] Nonetheless, whether characterised as laggards or not, given the UK prohibitions are substantively modelled identically on Articles 101 and 102, it is suggested that, at least until there is any substantive reform or complete relaxation of the s60 harmonised interpretation principles, it is suggested that Brexit per se is likely to lead to minimal change in the enforcement strategy of the CMA, though it may then deal with the kind of EU-wide case, such as Google (or Hotel Online Booking) which would currently be the preserve of the European Commission.

CONCLUSIONS

The first part of this article considered the Case Outcomes in the decisional practice of the OFT and CMA for a 19 year period from 1 March 2000 to end February 2019. It should be stressed that we have only focused on the OFT/CMA and on its role under the main 'antitrust' prohibitions to the exclusion of its other tasks in merger control, markets and consumer protection generally and the increasingly significant enforcement practice of the other UK regulators under the prohibitions. This research demonstrated that following a relatively fallow period of enforcement around 2005-2012 there has been an increase in CMA enforcement activity as evidenced by Case Outcomes since 2013, and reflecting the CMA's explicit aim of increasing its enforcement activity.[186] The Case Prioritisation Principles have been significant in steering enforcement activity and informal case closures, but there has been an increase in Infringement Findings (with fines) in recent years. There have been

[185] Monti, ibid at 105.

[186] This is evidenced clearly by the existence of 23 ongoing open investigations as at 28 February 2019.

disappointingly few abuse of dominance Infringement findings although this is perhaps inevitable due to the potential economic and legal complexities in abuse cases that make them difficult, time-consuming and inefficient to prioritise. Instead inevitably enforcement resources, and consequently successful Infringement Case Outcomes, have focused on anti-competitive agreements, and by object arrangements in particular. The Chapter I prohibition has predominated, although there is clear evidence of application of the EU prohibitions in recent years. In this context we examined the authority's treatment of the RGM and AIST issues. Although a wide interpretation of the AIST test has been adopted and EU law applied regularly, the RGM has been defined narrowly and fines applied on the basis of UK-wide markets only. Discussion of the wider EU context demonstrates that the OFT/CMA enforcement of the EU prohibitions has been limited, relative to the other major NCAs at least. However, there is academic evidence which suggests that the UK authority's practice to apply EU law to local cases and contexts only, is common practice across the ECN, contrary to the enforcement context envisaged by Regulation 1 and the Network Notice. The NCA+ Directive does little to alter this practice. Furthermore, it is envisaged that the CMA's enforcement practice post-departure of the EU is unlikely to change significantly as a result.[187]

A constant theme for any competition authority is resources, resource allocation and prioritisation.[188] In this context the CMA is likely to focus more on digital markets and the online environment,[189] a trend already witnessed in enforcement Case Outcomes in 2017. It is also likely that the CMA will continue to balance its enforcement portfolio with localised cases and cases of greater geographical and consumer impact. More generally, any competition authority has to divide its attention and resources between its compulsory or reactive workload[190] and its prioritised plan or discretionary workload. While this balance may be affected to some extent by Brexit-related workload at least in the short-term the data analysed in the first part of the article may reflect this conflict with the focus on anti-competitive agreements (consequent upon a leniency application process) thereby potentially diverting resources from discretionary and potentially more problematic abuse of dominance type cases. However, although leniency and settlement have played a prominent role in facilitating the efficacious enforcement of the rules by the OFT/CMA, particularly in the years 2010-2016, there has been a worrying trend in the last two years of a significant number of cases involving neither and if continued, this could potentially impact on the CMA's ability to successfully conclude more cases. The CMA's enforcement record in the coming years will be scrutinised to assess the extent to which it can successfully balance these

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[187] March 18, 2019, CMA 106; https://www.gov.uk/government/publications/guidance-on-the-functions-of-the-cma-after-a-no-deal-exit-from-the-eu; 22 February 2018, Reflections on the past; ambitions for the future, Speech given by CMA General Counsel, Sarah Cardell, at the UK Competition Law 2018 conference, https://www.gov.uk/government/speeches/reflections-on-the-past-ambitions-for-the-future.

[188] see Lucey, M-C, 'Editorial- The Chicken or the Egg? Dilemmas in Framing Enforcement Priorities' (2018) Comp L. Rev 13(1) 1-8 and Kovacic, W E 'Deciding What to Do and How to Do it: Prioritization, Project Selection and Agency Effectiveness' (2018) Comp L. Rev 13(1) 9-26, available at https://clasf.org/browse-the-complrev/.

[189] https://www.gov.uk/government/speeches/michael-grenfell-on-antitrust-in-the-digital-age

[190] Merger control and leniency-based enforcement.

different tasks, impose significant fines in a sufficient number of cases and achieve a strong and deterrent competition law enforcement record.

Despite the CMA's recent avowed intention to increase the number of case investigations and outcomes, how can we explain the limited enforcement output over the years by the OFT/CMA with only 55 infringement findings in total and a mere 16 infringement findings involving the EU law prohibitions since 1 May 2004? It may partly be explained by the timescale and workload involved in significant major competition law investigations involving the review of very large volumes of evidence and involved administrative processes (such as 'access to file' and written/oral representations), exemplified for instance by the Construction Industry bid-rigging Case in 2009. Clearly, the need to review relevant evidence robustly and have in place administrative processes which allow parties to test the CMA's case are vital to ensuring parties' rights of defence are respected; however, it is inevitable that these have an effect on the length and complexity of CMA investigations under the Act. Fruitful further research may be done on the regularity and substantive scope of procedural challenges to the CMA in its investigation and enforcement activity under the Act; this would greatly assist in understanding how credible the risk posed by procedural challenges to efficient enforcement of the prohibitions is in reality.

The workload burden issue may help one to understand the CMA's mixed strategy, where they also focus on smaller localised alleged infringements, as these are easier and more straightforward investigations to undertake and complete, in addition to reinforcing the competition ethos and message in smaller market contexts. It is recognised that all competition authorities and agencies need to prioritise particular sectors, practices and types of case and that not all potential/alleged infringements can be investigated by an authority with limited resources, Nonetheless, although (partly in response to Brexit) the CMA has asked for and been allocated further resources and manpower, it is evident that the CMA (and its predecessor the OFT) has been one of the better resourced NCAs in the European Union.

A further contributing factor to the lack of infringement findings may be the significant role the CAT plays generally in UK competition law, and particularly in its role as an appellate body in relation to the application of the prohibitions by the CMA (and concurrent regulators). It has a wide jurisdiction (in particular, undertaking a merits review of CMA infringement decisions under the Act[191]) and has played a significant role in developing the law and 'reviewing' the decision-making of the CMA. As recognised by Lord Tyrie's recent 'letter' advocating reform to the CAT's role here, its wide-ranging appellate function and the increasing resort to it by parties has inevitably required a considerable portion of the CMA's resources to be devoted to the appeals process. Moreover, the intensiveness of the CAT's merits-based appellate jurisdiction as regards infringement decisions under the Act may incentivise the CMA to 'gold plate' its investigative and analytical processes in order to protect itself from negative judicial treatment in the CAT, reinforcing the point raised above regarding the workload involved in CMA investigative processes. Finally, the limited number of abuse infringement findings may be understood partly as a reflection of the perceived specific

[191] Schedule 8, paragraph 3(A1) and (1) of the Act

difficulties in pursuing abuse allegations and also it is suggested the reticence (at least by the OFT) to develop a wider view of the scope of the abuse prohibition, as demonstrated for instance in *Burgess*. Overall, the writer believes that Lord Tyrie's contribution may be timely in kickstarting debate to reflect upon some of the ongoing enforcement issues viz. CMA procedural efficiency, enforcement efficacy vs. parties' rights of defence and the appropriate appellate jurisdiction of the CAT. Irrespective of the outcome of Brexit, it is important to analyse the UK competition law prohibition case-law to date and allow the CMA to further reflect on how it may further enhance and increase the effectiveness of its competition law enforcement practice in future.