Aspects of Competition Law

- The relationship between EU and domestic competition law
- EU competition law
- UK competition law

Introduction

It is well established that a competitive marketplace results in a number of benefits. As competitive markets provide consumers with a choice of goods and services, manufacturers and suppliers will wish to make their goods or services seem more attractive by:

- Offering to sell their goods or offering to provide their services at a lower price;
- By producing goods of superior quality to those of their rivals, or;
- By offering a superior level of service compared to their rivals.

Strong competition encourages businesses to provide these benefits and, as a consequence, it also encourages businesses to use and allocate their resources efficiently. Conversely, where competition is weak, prices tend to be higher, goods may be of lower quality and resources may not be optimally used or allocated. New producers may be unable to enter the market, thereby denying consumers the opportunity for greater choice and to purchase potentially new and superior products. Competition law exists to avoid the detrimental effects of monopolistic markets by prohibiting certain anti-competitive activities.

This chapter will discuss the principal competition law rules and the bodies that create and enforce them. It should be noted at the outset that competition law is a distinct legal topic on which many texts have been written – this chapter merely aims to provide the reader with a brief overview of the operation of the EU and UK competition law regimes and the principal legislative provisions. Readers looking for a more detailed and comprehensive discussion of the topic should consult a dedicated competition law text (of which several are listed in the ‘Further reading’ section at the end of this chapter).

The relationship between EU and UK competition law

All EU Member States are obliged to enforce EU competition law, but all of these States also have their own system of competition law. This section will briefly explain the relationship between EU competition law and UK competition law.¹

The first point to note is that many Member States have modeled their domestic competition law closely on EU competition law – indeed, as will be seen, the Chapter I and Chapter II prohibitions found in the Competition Act 1998 are clearly very similar to Arts 101 and 102 of the TFEU. The consequence is that the result may be the same irrespective of

¹ For a more detailed discussion of the relationship between EU and national competition law, see Sandra Marco Colino, Competition Law of the EU and UK (7th edn, OUP 2011) ch 3.
whether proceedings are brought under national law or EU law (although clearly, the 
enforcement bodies and procedures involved will differ). However, domestic laws do 
diverge from EU and the question to ask is which system takes priority in the event of a 
conflict. It is well established that, in the event of a conflict between EU law and domestic 
law, the former takes precedence and must be applied by the domestic court.² The primacy 
of EU law means that domestic courts must also interpret EU law in a manner that is 
consistent with the interpretation of the Court of Justice of the EU.

The key EU competition law provisions can be found in Arts 101 and 102 of the TFEU. As Arts 
101 and 102 are directly effective, they can be enforced in a national court, as well as being 
enforced in the Court of Justice of the EU. The result is that enforcement of EU competition 
law is shared between the European Commission, the Court of Justice of the EU, the 
competition authorities of the Member States, and the domestic courts of the Member 
States. The question that arises is what is the relationship between these bodies.

The answer can be found in Regulation 1/2003,³ which envisages a cooperative relationship 
between the Commission and national competition authorities/courts. Article 15 provides 
that, in relation to Arts 101 and 102 cases:

- courts of the Member States may ask the Commission to transmit to them 
  information in its possession, or its opinion on questions concerning the application 
  of EU competition rules;⁴
- Member States must forward to the Commission a written copy of any judgment of 
  a national court relating to the application of Arts 101 or 102. This copy should be 
  sent to the Commission without delay after the full written judgment is notified to 
  the parties;⁵
- Competition authorities of the Member States, acting on their own initiative, may 
  submit written observations to national courts on issues relating to the application 
  of Arts 101 and 102 of the TFEU. The Commission may also submit written 
  observations to the courts of the Member States.⁶

Even though a cooperative relationship is envisaged, Art 16 of the Regulation makes it clear 
that EU law remains supreme. Article 16(1) states that

When national courts⁷ rule on agreements, decisions or practices under Article [101] 
or Article [102] of the Treaty which are already the subject of a Commission decision, 
they cannot take decisions running counter to the decision adopted by the 
Commission. They must also avoid giving decisions which would conflict with a 
decision contemplated by the Commission in proceedings it has initiated.

The following example demonstrates the application of Art 16 in practice.

³ Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on 
⁴ ibid Art 15(1).
⁵ ibid Art 15(2).
⁶ Cibid Art 15(3). With the permission of the court, both the competition authorities and the 
Commission may make oral observations.
⁷ Article 16(2) lays down a similar rule in relation to competition authorities of the Member States.

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ComCorp Ltd: Article 16 in practice

ComCorp Ltd has engaged in certain anti-competitive practices. The Commission has alleged that Comcorp has breached Art 101 of the TFEU and has initiated proceedings against ComCorp. ComCorp’s actions have also resulted in separate legal proceedings being brought in the High Court, but on the same legal ground (i.e. an alleged breach of Art 101). The Commission has informed the High Court that it has commenced proceedings against ComCorp.

In order to comply with Art 16, the High Court must not adopt a decision that would conflict with that of the Commission. In order to ensure this, the High Court may stay the proceedings until such time as the Commission makes its decision. In order to comply with Art 15(2), the High Court must provide a written copy of its judgment to the Commission once judgment has been notified to the parties.

In the above example, the Commission had yet to reach a decision. If the Commission had reached a decision prior to proceedings being brought against ComCorp in the High Court, then the High Court would be bound to follow the decision of the Commission\(^8\) (e.g. if the Commission held that Art 101 had been breached, the High Court must hold the same). However, if the High Court disagreed with the decision of the Commission, then it could either ask the Court of Justice of the EU for a preliminary ruling under Art 267, or await to see if the decision of the Commission was appealed.

The UK’s withdrawal from the EU

As discussed in chapter 1, the UK has triggered the process to withdraw from the EU. The effect of this on UK competition law will likely be minimal in the short-term as the European Union (Withdrawal) Act 2018 will, on the day the UK leaves the EU (i) convert all directly applicable EU law into UK law; (ii) preserve all UK laws that implement EU law, and; (iii) incorporate into UK law all EU Treaty rights that can relied on directly in a UK court.\(^9\) Accordingly, it is still important to discuss EU competition law.

EU competition law

The Treaty on the Functioning of the European Union (TFEU) (notably the competition chapter consisting of Arts 101 – 109) is the principal piece of EU law in relation to competition law, although how these provisions are applied in practice underwent considerable change and modernization as a result of the passing of Regulation 1/2003.\(^{10}\) Articles 101 and 102 (discussed later) contain the principal rules governing the prohibition of anti-competitive practices. However, before these provisions are discussed, it is important to understand how EU law is created and applied, and so the various institutions need to be discussed.

Institutions

The responsibility for creating, reviewing, interpreting and enforcing EU competition law is spread amongst a variety of different EU and domestic bodies of which the most important are (i) the Council of the European Union; (ii) the European Commission; (iii) the Court of Justice of the European Union; and (iv) the domestic courts of the Member States.

**The Council of the European Union**

The Council of the EU is the principal decision-making body of the EU, responsible (usually along with the European Parliament) for passing EU legislation and approving the EU’s budget. The Council is not involved with EU competition law on a day-to-day basis, preferring instead to delegate many competition law enforcement functions to the European Commission (discussed below). Despite this, the Council still plays an extremely important role through the passing of competition law legislation, of which notable examples include:

- Regulation 1/2003, which confers significant enforcement powers on the European Commission and national competition authorities.
- Regulation 139/2004, which empowers the European Commission to determine whether certain merges comply with EU law.
- The EU Damages Directive, which governs actions for damages under national law for competition law infringements.
- Numerous regulations have been passed that empowers the European Commission to grant block exemptions in relation to specified agreements or markets.

**European Commission**

The European Commission is perhaps the most important of all the EU institutions in relation to competition law. The Commission consists of twenty-eight Commissioners (one for each Member State), one of whom will be given responsibility for competition. This is a prestigious, high-profile role that confers significant powers upon the holder. However, in general, formal decisions of the Commission must be taken by the College of Commissioners as a whole and are usually taken by a simple majority.

Along with the European Council, the European Commission forms the executive of the EU, with Art 17(1) of the TFEU stating that:

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11 Not to be confused with the European Council (which is a different body within the EU) or the Council of Europe (which is not part of the EU).
12 TFEU, Art 16(1).
16 See e.g. Regulation 19/65 (intellectual property rights), Regulation 1534/91 (insurance market), Regulation 246/2009 (agreements between liner shipping companies), and Regulation 487/2009 (certain air transport sector agreements).
17 TFEU, Art 250.
The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.

From this, it is clear that the European Commission plays an extremely strong role in enforcing EU law, with the Commission being especially active in the field of competition law enforcement under Arts 101 and 102 (discussed later). To that end, the Commission is granted considerable power in investigating possible breaches of EU competition law and to commence legal proceedings where appropriate. If the Commission finds that an infringement has occurred, it can impose significant sanctions, as demonstrated in the following case.

Intel (Case Comp/C-3/37.990)

**FACTS:** Intel held the dominant position in the worldwide CPU market. Following a series of complaints from Intel’s chief competitor, AMD, the Commission discovered that Intel had given hidden rebates to computer manufacturers on the condition that they bought their CPUs from Intel only, and had made a direct payment to a major retailer on the condition that it stock only those computers with Intel CPUs. Intel also made direct payments to computer manufacturers on the condition that they halted or delayed launching products containing CPUs manufactured by Intel’s competitors.

**HELD:** The Commission found that the above practices constituted abuses of Intel’s dominant position in the CPU market, and prevented customers from choosing alternative products. The then Competition Commissioner, Neelie Kroes, stated that ‘Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for computer chips for many years. Such a serious and sustained violation of the EU’s antitrust rules cannot be tolerated.’ The Commission fined Intel a record €1.06 billion (around £854 million) and ordered it to cease any anti-competitive practices that were still ongoing.

In practice, the Commission’s powers relating to the enforcement of competition law are delegated to the Directorate-General for Competition (DG-COMP), which consists of a Director-General, three Deputy Directors-General, and a Chief Competition Economist. It should be noted that, in 2003, the Advisory Committee on Restrictive Practices and Dominant Positions was established. The Commission must consult with the Advisory Committee before it exercises certain enforcement powers conferred upon it. The Commission is not obliged to follow the advice of the Advisory Committee, but it must ‘take the utmost account of the opinion delivered by the Advisory Committee.’

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Another vital function in the Commission arises in relation to the creation of EU legislation. As noted above, the Council of the EU plays an important role in passing legislation but, unless the treaties state otherwise, only the Commission can propose legislation.\textsuperscript{22}

\textit{Court of Justice of the European Union}

The phrase ‘Court of Justice of the European Union’ (CJEU) is the collective term for the two EU courts, namely the Court of Justice (formerly the European Court of Justice) and the General Court (formerly the Court of First Instance), with both courts having a significant role to play in completing law matters. Article 237 of the TFEU states that the CJEU shall review the legality of legislative acts, and of acts of the various EU institutions in relation to competition law issues. This principally means that the CJEU can review the competition decisions of the Commission, including any penalties imposed by the Commission.

As is discussed later, the domestic courts of the EU Member States also directly apply EU competition law (providing that it is directly effective). Article 267 of the TFEU empowers the CJEU\textsuperscript{23} to provide national courts with preliminary rulings regarding the interpretation of EU law.

Many competition cases will first be heard in the General Court, which is granted the jurisdiction ‘to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialized court . . . and those reserved in the Statute for the Court of Justice.’\textsuperscript{24} Decisions of the General Court can be appealed to the Court of Justice on points of law only,\textsuperscript{25} namely ‘on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court’.\textsuperscript{26}

\textit{Courts of Member States}

The domestic courts of the EU’s Member States also have an important role to play in terms of the enforcement of EU competition law. Many of the competition law provisions found in the TFEU are directly applicable and so can be enforced in the domestic courts of Member States, with perhaps the most important directly applicable competition law provisions being Arts 101 and 102, which are examined next.

\textsuperscript{22} TFEU, Art 17(2). Note, however, that both the Council of the EU and the European Parliament can request that the Commission propose legislation in a particular area.

\textsuperscript{23} Although Art 267 empowers the CJEU to provide preliminary rulings, Art 256(3) states that the General Court can only provide preliminary rulings on specific areas laid down by the Statute of the Court of Justice of the European Union. As that Statute currently does not provide for any such areas, the Court of Justice will hear all preliminary rulings.

\textsuperscript{24} TFEU, Art 256(1).

\textsuperscript{25} TFEU, Art 256(1). The Court of Justice has stated that it will review cases on points of fact only where the facts set out to the General Court were ‘distorted’ (Case 204/000 etc Aalborg Portland A/S v Commission [2005] 4 CMLR 4 [49]).

\textsuperscript{26} Protocol (No 3) on the Statute of the Court of Justice of the European Union, Art 58.
**Article 101 and 102 of the TFEU**

The principal EU competition law provisions can be found in the competition chapter of the TFEU, namely Chapter 1 of Title VII. In particular, the key prohibitions are found in Arts 101 and 102. It should be noted at the outset that both Arts 101 and 102 are directly effective, meaning that they can be enforced, not only in the Court of Justice of the EU, but also in the national courts of Member States.

**Article 101**

The basic prohibition in Art 101 is set out in Art 101(1), which states:

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<th>Article 101(1) of the TFEU</th>
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<td>The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:</td>
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<td>(a) directly or indirectly fix purchase or selling prices or any other trading conditions;</td>
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<td>(b) limit or control production, markets, technical development or other trading conditions;</td>
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<td>(c) share markets or sources of supply;</td>
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<td>(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;</td>
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<td>(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.</td>
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Before discussing some of the more substantive terms in Art 101, three general points should be noted. First, Art 101(1) applies to certain activities that have as their ‘object or effect the prevention, restriction or distortion of competition within the internal market’. The phrase ‘object or effect’ establishes that Art 101 can be breached even if the conduct in question does not actually prevent, restrict, or distort competition, providing that the parties intended for it to have such an effect. Second, the list of activities in (a)-(e) is non-exhaustive, so other activities not specified in the list can still breach Art 101(1). Third, the de minimis rule applies, so conduct that has an insignificant effect on competition will not breach Art 101(1), with the following case providing an example of such an instance.

**Case 5/69 Franz Völk v ETS Vervaecke SPRL [1969] CMLR 273**

**FACTS**: Mr Völk traded under the name Josef Erd & Co (Erd) and was engaged in the business of manufacturing washing machines. ETS Vervaecke SPRL (Vervaecke) was a Belgian company that distributed household electrical goods. Erd entered into an agreement with Vervaecke, which provided that Vervaecke would have the exclusive right to sell Erd’s washing machines.

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27 Prior to the renumbering of the TFEU by the Treaty of Lisbon, the provisions found in Arts 101 and 102 were found in Arts 81 and 82 respectively. Many older cases refer to these pre-Lisbon provisions, so you should be aware of them.

products in Belgium and Luxembourg. A dispute arose between the parties that led to the validity of the agreement being questioned in a German court. It was clear that the agreement was anti-competitive, but the German court was conscious of the fact that Erd’s market share was very small – 0.2 per cent in Germany and 0.6 per cent in Belgium and Luxembourg. The court sought a preliminary ruling from the ECJ asking ‘must regard be taken to the fraction of the market which the plaintiff has in fact won or has finally sought to win in the member States of the E.E.C . . . ’

Held: The ECJ ruled that Art 101 had not been infringed on the ground that ‘an agreement escapes the prohibition of Article [101] when it only affects the market insignificantly, account being taken of the weak position held by the parties on the market in the products in question.’

In order to appreciate the operation of Art 101, there are several specific issues that need to be discussed in more detail, namely:

- What types of activity can infringe Art 101?
- What is an ‘undertaking’?
- To what extent must the conduct affect trade between Member States?
- What are the consequences of a breach of Art 101?

The first issue to discuss is what types of activity can breach Art 101. Article 101 identifies three broad types of activity that can breach Art 101, namely:

1. **Agreements between undertakings**: This occurs where two or more undertakings agree to prevent, restrict or distort competition. No formal agreement (e.g. a contract) need actually exist, and an agreement can be evidenced by conduct. What is essential is that two or more undertakings must be involved – entirely unilateral conduct is not covered by Art 101.

2. **Decisions by associations of undertakings**: Very often, industries will have their own trade association (e.g. the Association of the British Pharmaceutical Industry, the National Federation of Builders) which often engage in activities designed to benefit its members (e.g. promotional campaigns, political lobbying, market research etc). Trade associations may also be used to co-ordinate activities designed to prevent, restrict or distort competition (thereby allowing its members to deny that they have agreed to engage in such behaviour). Article 101 prohibits such activities by trade associations.

3. **Concerted practices**: Concerted practices form a much more general and ambiguous category of prohibited conduct and tend to occur where there is evidence of anti-competitive behaviour, but there is little evidence indicating the existence of an agreement between undertakings.

It will be noted from the above that Art 101 relates to agreements, decisions, and practices entered into by undertakings or associations of undertakings. From this, it follows that it is important to understand precisely what an undertaking is. The word undertaking is not defined in the TFEU and so determining the precise scope of the term has been left to the Court of Justice of the EU. It should be noted at the outset that the term undertaking has the

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29 Case 5/69 **Franz Völk v ETS Vervaecke SPRL** [1969] CMLR 273 [3].
30 Case T-41/96 **Bayer AG v EC Commission** [2001] 4 CMLR 4. As will be seen, unilateral action is covered by Art 102.
same meaning for Arts 101 and 102 (indeed, much of the case law on what constitutes an undertaking relates to Art 102 infringements).

The starting point is case of Höfner and Elser v Macrotron GmbH,\(^{31}\) where the European Court of Justice held that ‘the concept of an undertaking, encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.’\(^{32}\) From this, it can be seen that the courts adopt a functional approach whereby the activity in question is the key factor, and not the status of the party concerned. As a result, it has been held that a wide array of persons and bodies can amount to an undertaking, including formal business structures (e.g. companies, partnerships, etc), individuals,\(^ {33}\) public authorities,\(^ {34}\) sporting bodies,\(^ {35}\) professionals,\(^ {36}\) professional bodies, trade associations\(^ {37}\), and agricultural cooperatives.\(^ {38}\) The use of a functional test also means that an entity may amount to an undertaking when carrying out a certain function, but may not amount to an undertaking when carrying out a different function.\(^ {39}\)

The question that raises is what sort of activity will result in an entity being labeled as an undertaking. The quote above from Höfner and Elser states that the activity must be ‘economic’, but this is a rather vague word. There has been a huge amount of case law on this issue and it is beyond the scope of this chapter\(^ {40}\) to discuss them all but, based on the case law, the following general points can be made:

- Any activity that consists of ‘offering goods or services on a given market’ will amount to an economic activity.\(^ {41}\) There is no need for an entity to actually manufacture the goods in question – selling goods manufactured by others will be sufficient.
- As long as the activity is economic, the fact that it does not, nor was it intended to, make a profit is irrelevant.\(^ {42}\)
- Although public authorities can constitute undertakings, they will not do so when the activity in question is ‘connected with the exercise of the powers of a public authority’.\(^ {43}\)
- The courts have held that companies within the same corporate group (e.g. parent and subsidiary(ies)) can amount to a single undertaking (this is known as the ‘single

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\(^{35}\) The Distribution of Package Tours During the 1990 World Cup [1992] OJ L326/31.


\(^{40}\) For a detailed discussion of the case law, see Alison Jones and Brenda Sufrin, EU Competition Law: Text, Cases and Materials (4th edn, OUP 2011) 124-41.


\(^{42}\) The Distribution of Package Tours During the 1990 World Cup [1992] OJ L326/31.

Whether or not a group of companies will form a single undertaking will depend on the closeness of the relationship between them. This, and the practical effect that the single economic entity doctrine can have on Art 101, can be seen in the following case.

**Case C-73/95 P Viho Europe BV v Commission** [1996] ECR I-5457

**FACTS**: Parker Pen Ltd (Parker), a company incorporated in England, was in the business of manufacturing writing utensils. These writing utensils were sold through a series of subsidiary companies based in Belgium, France, Germany, the Netherlands and Spain. Parker held 100 per cent of the shares in these subsidiaries. Viho Europe BV (Viho), a Dutch company, was a wholesaler, importer and exporter of office supplies. Viho wished to obtain Parker products, but could not do so on the same terms as Parker’s subsidiaries. Viho lodged a complaint with the Commission, contending that the agreements in place between Parker and its subsidiaries was in breach of Art 101(1). This complaint was rejected by the Commission and the appeal against the Commission decision was rejected by the Court of First Instance. Viho appealed to the European Court of Justice.

**HELD**: The European Court of Justice rejected the appeal and upheld the decisions of the Commission and the Court of First Instance. The European Court of Justice stated that:

> Parker and its subsidiaries ... form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company controlling them.

Article 101 only applies to agreements between two or more undertakings. Accordingly, given that Parker and its subsidiaries were regarded as one undertaking only, the agreements that existed between them were outside the scope of Art 101(1).

Article 101 will only be infringed if the conduct in question affects trade between Member States. The European Court of Justice stated that the purpose of this requirement is:

> to define ... the boundary between the areas respectively covered by [EU] law and the law of the Member States. Thus [EU] law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States ... On the other hand, conduct the effects of which are confined to the territory of a single Member State is governed by the national legal order.

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44 The courts have also stated that the single economic entity doctrine can apply in relationships of agency, thereby resulting in principal and agent being regarded as a single undertaking.


47 Case 22/78 Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission [1979] 3 CMLR 345 [17].

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In determining whether an agreement or decision affects trade between Member States, the starting point is the test laid down in *Société La Technique Minière v Maschinenbau Ulm*,\(^{48}\) where the European Court of Justice stated that:

> it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.\(^{49}\)

It is clear that this test is not difficult to satisfy, but it does contain some terms that require further elaboration. Fortunately, the European Commission has published guidelines on the effect on trade requirement,\(^{50}\) of which the key points are:

- Trade between Member States is not limited to exchanges of goods and services across borders, but will cover all cross-border economic activity. It will also encompass cases where agreements or decisions affect the competitive structure of a market.
- The effect on trade between Member States need not affect the entire Member State, but may only affect part of the Member State. Further, the effect on trade requirement is independent of the definition of the relevant geographic market. An agreement or decision may only operate in a specific Member State, yet it may still affect trade between Member States.
- There is no need to demonstrate that the undertakings in question subjectively intended their conduct to affect trade between Member States.
- The effect on trade between Member States must be appreciable, and the stronger the market position of the undertakings concerned, the more likely it is that the effect will be appreciable.

The final issue to discuss is what are the consequences of breaching Art 101. The answer can be found in Art 101(2), which states that any agreement or decision that breaches Art 101 is automatically void. However, Art 101(3) provides that an agreement between undertakings, a decision by an association of undertakings, or a concerted practice that prevents, restricts or distorts competition may be excluded from the prohibition contained in Art 101(1) if it contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, or;
- afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 103(2)(b) allows the Council to ‘lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other’ and to this end the Council has drafted a list of agreements (known as ‘block exemptions’) that will

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\(^{49}\) Case 56/65 [1966] ECR 249.

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automatically come under the ambit of the exclusion contained in Art 101(3) (e.g. certain concerted practices within the motor vehicle market are excluded from Art 101(1)).

**Article 102**

Article 102 is a very useful companion provision to Art 101, but its application is much narrower. Article 102 tends to principally apply to larger undertakings and the result of this is that breaches of Art 102 are much less frequent than breaches of Art 101, largely because such undertakings have, or can obtain, legal knowledge and advice that can prevent them from engaging in conduct that breaches Art 102.

Article 102 states:

**Article 102 of the TFEU**

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

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

It is clear that, in several important respects, Art 102 differs from Art 101 and, before the key terms in Art 102 are discussed, it is important to understand how Arts 101 and 102 differ and the relationship that exists between them. Three key differences can be identified. First, unilateral conduct is not covered by Art 101, whereas the unilateral actions of one undertaking can result in a breach of Art 102. Second, Art 101 applies to anti-competitive conduct (i.e. conduct that harms competitors), whereas Art 102 can apply also to conduct that does not harm competitors, but instead benefits the undertaking in breach of Art 102. Third, undertakings that breach Art 101 can seek to obtain an exemption from Art 101 — no such exemption is available for breaches of Art 102.

Despite the differences in the scope of Arts 101 and 102, the two provisions are not mutually exclusive and certain activities can result in a breach of both provisions, as the following example demonstrates.

**ComCorp Ltd: A breach of Arts 101 and 102**

ComCorp Ltd and Office Supplies Ltd are the two major retailers of office furniture in the UK. They enter into a clandestine agreement, which will involve both companies increasing...
current prices to an agreed fixed price, which will then be increased every year. The two companies also agree not to undercut the other on price and to coordinate sale activities, so that the same goods are discounted to the same price. Finally, each company agrees not to open new retail stores in areas where the other already has a retail store in operation.

The agreement between the two companies is clearly anti-competitive and will likely amount to a breach of Art 101. The two companies have also likely abused the dominant position that they hold in the UK market, which will likely also result in a breach of Art 102.

In order to establish that a breach of Art 102 has occurred, five conditions need to be met, namely (i) the alleged breach of Art 102 must have been undertaken by an undertaking; (ii) the undertaking must occupy a dominant position; (iii) it must occupy this dominant position within the internal market, or in a substantial part of it; (iv) the undertaking must have abused that dominant position; and (v) the abuse must affect trade between Member States. The definition of an undertaking and what type of conduct will affect trade between Member States are the same as under Art 101 (both of which have already been considered), so this section will focus on the remaining conditions.

In order for a breach of Art 102 to occur, the undertaking in question must occupy ‘a dominant position within the internal market or in a substantial part of it . . .’ If two or more undertakings are involved, they must collectively occupy a dominant position. Accordingly, it is important that we understand what constitutes a dominant position, with the European Court of Justice stating that a dominant position:

relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.52

The use of the words ‘relevant market’ indicates that before the court can determine whether the undertaking occupies a dominant position within a market, it must first determine what the appropriate market is – a task that is not always straightforward and which the courts have not always undertaken successfully.

Once the court has determined the relevant market, it will then determine whether the undertaking occupies a dominant position within that market. It should be noted that a dominant position does not require that there is no competition – as the European Court of Justice has stated, the requirement of a dominant position:

does not preclude some competition . . . but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.53

The Commission has provided guidance\(^5^4\) on its approach to determining whether an undertaking occupies a dominant position. Some key points to note include the following:

- An undertaking can generally be regarded as dominant if it can profitably increase prices above a competitive level for a significant period of time.
- The higher that share of a market share that an undertaking controls and the longer the period of time over which it is held, the more likely it is to be dominant. Dominance will not be likely if the undertaking’s market share is below 40 per cent in the relevant market. However, it should be noted that market share merely provides a useful starting point for inquiry and is not determinative in itself.
- The dominance of an undertaking should not be considered solely based on current market conditions. Regard should also be had to future conditions such as the potential impact of expansion of the market by actual or potential competitors. Regard should also be had to actual and potential barriers to entry.
- Regard should be had to countervailing buyer power, namely the extent to which constraints may be exerted by potential customers.

Once it has been established that the undertaking occupied a dominant position, it must then be established that it occupied this dominant position ‘within the internal market, or in a substantial part of it.’ The existence of this condition demonstrates that EU law is not concerned with local or purely national abuse of a dominant position – such cases are the concern of the domestic competition law of the relevant Member State. The result of this is that, if this condition cannot be satisfied, Art 102 will not be breached, but the undertaking may have breached the Member State’s domestic equivalent of Art 102.\(^5^5\)

Where the undertaking occupies a dominant position throughout the EU, then no problem arises and this condition will be easily satisfied. The issue is slightly more complex where it has to be determined whether the undertaking occupies a dominant position within a substantial part of the internal market, especially as the Court of Justice of the EU refuses to set a specific percentage of the internal market that will count as substantial. What is clear is that the Court will not simply focus on the geographical scope of an undertaking’s business, but will also take into account other factors, with the following case demonstrating the importance of looking at the undertaking’s volume of production.

### Cases 40/73 etc Coöperatieve Vereniging ‘Suiker Unie’ UA v Commission [1976] 1 CMLR 295

**FACTS:** In 1973, the Commission imposed fines on 16 undertakings on the ground that they had abused their dominant positions in the sugar market. One of these undertakings, Raffinerie Tirlemontoise (RT), appealed on the basis that it did not occupy a substantial part of the internal market, as it only conducted business in Belgium, Luxembourg and Southern Germany (the Commission held that RT only held a dominant position within Belgium and Luxembourg). RT also drew attention to the fact that sugar production from Belgium and Luxembourg accounted for only a small percentage of overall sugar production in the EU.

**HELD:** RT’s appeal was dismissed. The European Court of Justice stated that the requirement

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\(^5^5\) In the case of the UK, this would be the Chapter II prohibition found in the Competition Act 1998 (discussed later in this chapter).
that an undertaking occupy a dominant position within a substantial part of the internal market:

is concerned less with the geographical size of the actual territory in which the undertaking concerned exerts its influence as with the economic importance of the market which it controls. Consequently, for the purpose of determining whether this condition is fulfilled, certain purely quantitative factors such as the level and the pattern of production and consumption have to be evaluated.

Applying this, the Court’s decision was heavily influenced by the fact that, in 1971/72, sugar production in Belgium and Luxembourg amounted to 770,000 tons (over half of which was produced by RT), which accounted for nearly 10% of all sugar production in the EU. Further, large surpluses were produced in these countries, so the excess sugar was exported to other Member States and beyond. These factors combined led the Court to hold that RT did indeed occupy a dominant position within a substantial part of the internal market.

As the geographical reach of the undertaking is not the sole factor, it follows that an undertaking that operates in a single Member State may nevertheless occupy a dominant position within a substantial part of the internal market. It has even been held that parts of Member States may constitute a substantial part of the internal market. However, it should be noted that many of these cases were decided before the enlargement of the EU that occurred in the last two decades. Whether a single Member State would constitute a substantial part of the internal market today is open to debate, although it has been argued that it would be ‘politically insensitive’ to state that any Member State did not constitute a substantial part of the internal market. Nevertheless, as the number of EU Member States continues to grow and as the internal market becomes larger, the Court of Justice of the EU may ultimately decide that a single Member State does not constitute a substantial part of the EU for the purposes of Art 102.

Occupying a dominant position is not in itself anti-competitive, nor will it result per se in a breach of Art 102. Liability under Art 102 will only be imposed if it can be shown that the undertaking has abused that dominant position. However, it should be noted that, even though occupying a dominant position is not per se anti-competitive, the Court of Justice of the EU has repeatedly stressed that undertakings that occupy a dominant position do have a ‘special responsibility’ in terms of competition. As the European Court of Justice stated:

A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.

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57 See e.g. Case 226/84 British Leyland plc v Commission [1986] ECR 3263, where the UK was held to constitute a substantial part of the internal market.
58 See e.g. Case 22/78 Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission [1979] ECR 1869, where the South-East of England was held to constitute a substantial part of the internal market.
60 For a detailed discussion of what constitutes a dominant position, see Alison Jones and Brenda Sufrin, EU Competition Law: Text, Cases and Materials (6th edn, OUP 2016) ch 6.
From this, it follows that conduct that may be regarded as abusive if engaged in by a dominant undertaking may not be found abusive if entered into by an undertaking that did not occupy a dominant position. The special responsibility of dominant undertakings is also evidenced in that they need not actually use their dominant position in order for Art 102 to be infringed — all that need occur is that they engage in abuse behavior whilst occupying a dominant position.\textsuperscript{62}

The question ask now is what constitutes abuse. The following statement of the European Court of Justice established the foundation for the case law on what types of conduct can amount to abuse:

> The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.\textsuperscript{63}

Although the term ‘abuse’ is not defined in Art 102, examples are provided of the types of conduct that may amount to a breach of Art 102. These examples, however, are not exhaustive\textsuperscript{64} and the courts have found that conduct that is outside the scope of these examples can amount to a breach of Art 102. Having said that, many of the breaches of Art 102 do tend to fall into two broad types (although these classifications are not exhaustive or definitive).

The first type of abuse are exclusionary abuses and occur where dominant undertakings act in such a way as to prevent or exclude competition. Examples of exclusionary abuses include:

- Exclusive purchasing agreements under which the purchaser agrees that it will only purchase goods from the dominant undertaking.
- Discriminatory discounts or rebates which are provided only to certain persons (e.g. those who agree to enter into exclusive purchasing agreements).
- The imposition of excessive prices could be exclusionary. For example, if an undertaking controls an essential facility or piece of machinery and it charges excessive prices for use of that facility/machinery.

The second type of abuse are exploitative abuses which, as the name suggests, occur where the dominant undertaking exploits its position. Examples of this type of abuse include:

- The imposition of unfair purchase or selling prices. Companies that occupy a dominant position may be able to impose excessive prices on consumers. In exceptional circumstances, a breach of Art 102 may occur where a dominant undertaking is charging excessively low process for its products.

\textsuperscript{63} Case 85/76 Hoffmann-La Roche & Co AG v Commission [1979] 3 CMLR 211 [91].
• A very powerful undertaking may also be able to exploit its position by forcing another into offering an unfairly low price.
• The bundling of certain products with other products. For example, Microsoft was found to have breached Art 102 by bundling its Windows Media Player software with its Windows operating system. It was ordered to offer a version of Windows that did not include Windows Media Player.

The final issue to discuss is what are the consequences for breaching Art 102. Where an infringement is established, the Commission is empowered to:
• Impose a fine on the undertaking in question.65
• Require the undertaking to bring the infringement to an end.66 This could involve requiring the undertaking to cease the behavior in question, or it could require the undertaking to perform some type of act. These are known as ‘behavioral remedies’.
• The Commission can also impose what are termed ‘structural remedies’,67 which basically involves the Commission changing the structure of the undertaking in question in order to prevent the infringement from occurring again. As structural remedies are more severe than behavioral remedies, they can only be imposed where behavioral remedies are not available or would be more burdensome than a structural remedy. To date, the Commission has yet to order a structural remedy.
• Instead of ordering an undertaking to bring the infringement to an end, the Commission may accept from the undertaking concerned a binding commitment from the undertaking that it will not repeat the infringement in question.68 Where the commitment is accepted, then the case file will be closed without a finding as to whether Art 102 has been breached. However, the Commission may reopen the case file and commence proceedings against the undertaking (i) if there occurs a material change in the facts on which the decision was based; (ii) if the undertaking does not uphold the commitment, or; (iii) if the Commission’s decision was based on incomplete, incorrect or misleading information provided by the parties.69

The Commission is also empowered to order interim measures where a prima facie finding of an infringement has occurred.70 Interim measures can only be imposed in cases of urgency due to the risk of serious and irreparable damage to competition and any interim measures ordered will only apply for a specified period (although they can be renewed if it is necessary and appropriate).71

UK competition law

Prior to 1998, UK competition law was primarily found in a series of statutes, such as the Fair Trading Act 1973, the Restrictive Trade Practices Acts of 1976 and 1977, and the Resale Act 1976. In 1997, the government announced that it intended to streamline the competition

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66 ibid Art 7.
67 ibid Art 7.
68 ibid Art 9(1).
69 ibid Art 9(2).
70 ibid Art 8(1).
71 ibid Art 8(2).
law provisions into one Act that was more in harmony with Arts 81 and 82 of the EC Treaty (now Arts 101 and 102 of the TFEU). The result was the Competition Act 1998 which came into force on 1st March 2000 and largely repealed previous competition law legislation. A few years later, the rules and procedures relating to the enforcement of competition law were substantially reformed by the Enterprise Act 2002, and it is these two pieces of legislation that dominate UK competition law. Significant reforms were also made by the Enterprise and Regulatory Reform Act 2013.

Before these statutes are discussed, it is important to understand which bodies are responsible for investigating and enforcing competition law. As will be seen, UK competition law is currently in a process of reform in terms of which bodies are tasked with enforcing competition law.

The competition authorities

The responsibility for investigating and enforcing competition law is spread across a number of bodies that are known as the competition authorities. Currently, the principal competition authorities are:

- The Competition and Markets Authority
- The Competition Appeal Tribunal
- The Serious Fraud Office
- The national courts.

Each of these bodies will now be discussed.

The Competition and Markets Authority

Prior to the passing of the Enterprise Act 2002, the responsibility for enforcing competition law lay with the Director General of Fair Trading. It soon came to be thought inappropriate that one person should have such a concentration of power and so the Enterprise Act 2002 abolished the office of Director General of Fair Trading and transferred the powers of that office to a newly-established body entitled the Office of Fair Trading (OFT), which worked alongside another body called the Competition Commission (CC).

A 2010 report of the Global Competition Review awarded the CC the highest rating of 5 stars and the OFT 4.5 stars, with both competition bodies ranked amongst the top 5 competition authorities in the world. A KPMG review ranked the UK’s competition law regime the third best in the world, ranking only behind the USA and Germany. Despite this, in March 2011, the government published a consultation document in which it proposed to abolish the CC.

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73 The post of Director General of Fair Trading was created by s 1 of the Fair Trading Act 1973.
74 Enterprise Act 2002, s 2(2) (now repealed).
75 Enterprise Act 2002, 2(1) (now repealed). This transfer occurred on the 1 April 2003.
76 Enterprise Act 2002, s 1(1) (now repealed).
78 KPMG, ‘Peer Review of Competition Policy’ (KPMG 2007).
and the OFT and replace these bodies with a new body, entitled the Competition and Markets Authority (CMA). The government advanced a number of reasons for the reform:

- Under the current regime, market studies/investigations, and antitrust and merger cases can take a significant amount of time to be resolved. In turn, this can serve to deter the sector regulators from utilizing their competition powers. The government believes that merging the functions of the CC and OFT can help make better use of resources and result in quicker decisions.
- Merging the OFT and CC into a single body will help ensure that decision-making is more consistent.
- Under the current regime, antitrust cases can be extremely lengthy and expensive, which has resulted in a low number of cases being brought, which in turn reduces the deterrent effect of the relevant prohibitions.

In March 2012, the government announced that it planned to go ahead with its proposal to establish the CMA. The creation of the CMA was provided for by the Enterprise and Regulatory Reform Act 2013 (ERRA 2013), which was enacted in April 2013. The OFT and the Competition Commission were abolished and their functions transferred to the CMA in April 2014.

The general functions of the CMA are set out primarily in ss 5-7 of the 2002 Act:

- Section 5(1) of the 2002 Act provides that the CMA has the function of ‘obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions’.
- Section 6(1) provides that the CMA will make the public aware of the ways in which competition may benefit consumers, and provide information in relation to the functions of the CMA. The CMA website provides a significant amount of useful, accessible information that seeks to advise interested parties on the competition law regime.
- Section 7 provides that the CMA will make proposals or provide information or advice to ministers, either on its own initiative or from a request from the minister.

In relation to the enforcement of competition law, the CMA performs three vital functions. First, it is under a duty to refer to its Chair any merger that it believes could result in a substantial lessening of competition. Second, the CMA can institute or consent to the bringing of criminal proceedings against an individual if they are part of a cartel, although, in the majority of instances, it will be the Serious Fraud Office that initiates a prosecution. Third, the CMA may conduct an investigation if it has reasonable grounds for suspecting that certain breaches of competition law have occurred. In conducting such an investigation, the CMA is given significant powers in terms of gathering information, and entering business

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80 ibid paras 1.6 and 1.7.
81 BIS, Growth, ‘Competition and the Competition Regime: Government Response to Consultation’ (BIS 2012) 5.
82 ERRA 2013, s 25(1).
83 Enterprise Act 2002, ss 22 – 41B.
84 Enterprise Act 2002, s 190(2)(b). The cartel offence is discussed later in this chapter.
85 The full list of possible competition breaches can be found in s 25 of the Competition Act 1998.

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and domestic premises.\textsuperscript{86} Failure to comply with an CMA investigation usually results in the commission of a criminal offence.\textsuperscript{87}

If the CMA has commenced an investigation but has yet to reach a decision,\textsuperscript{88} then it may accept a commitment from the person concerned, under which that person commits to take, or refrain from taking, such action as the CMA considers appropriate.\textsuperscript{89} Where such a commitment is accepted by the CMA, then the investigation will be discontinued and the CMA will not make a decision or a direction regarding the case.\textsuperscript{90} However, if the commitment is breached without reasonable excuse, then the CMA may apply to the court to enforce the commitment.\textsuperscript{91} The following real-life example (which also was the first occasion on which the OFT accepted a commitment) demonstrates how the commitment procedure operates.

\begin{table}[h]
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\begin{tabular}{|p{\textwidth}|}
\hline
\textbf{Example: TV Eye Ltd} \\
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TV Eye Ltd was a company owned by ITV, GMTV, Channel 4 and Channel 5. TV Eye provided services to its owners and to other smaller broadcasters. The Institute of Practitioners in Advertising (IPA) complained to the OFT that TV Eye was engaging in activities that breached the Chapter I prohibition of the Competition Act 1998. Specifically, the IPA alleged that the owners of TV Eye were agreeing between them the terms and condition under which advertising airtime would be sold to media agencies, thereby placing those agencies in an unduly weak bargaining position. The OFT believed that reasonable grounds existed to suspect that the Chapter I prohibition had been infringed and so it commenced an investigation.

Before the investigation was concluded, TV Eye and its owners offered to make a number of commitments that would result in the OFT’s concerns being allayed. The OFT, following a public consultation, accepted the commitments in May 2005 and its investigation was accordingly closed.

TV Eye adhered to the commitments and amended its business practices. In 2006, TV Eye assured the OFT that it would no longer be operating in the fields of business that caused the OFT concern. Accordingly, in March 2006 following a public consultation, the OFT released TV Eye from its commitments on the condition that it does not recommence the relevant activity.

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If, following an investigation, the CMA believes that an infringement has occurred, then it has a number of options, including:

- The CMA can issue directions requiring the relevant person(s) to undertake appropriate action to bring the infringement to an end. This can include requiring


\textsuperscript{87} Competition Act 1998, ss 42-44; Enterprise Act 2002, s 201.

\textsuperscript{88} Section 31(2) of the Competition Act 1998 provides that a ‘decision’ means a decision of the CMA that an infringement has occurred of (i) the Chapter I prohibition; (ii) the Chapter II prohibition; (iii) Art 101(1(1) of the TFEU, or; (iv) Art 102 of the TFEU.

\textsuperscript{89} Competition Act 1998, s 31A(1) and (2).

\textsuperscript{90} ibid s 31B(2).

\textsuperscript{91} ibid s 31E(1).
the parties to an agreement to modify or terminate it, or requiring them to modify or cease the conduct in question. If the party (or parties) fail, without reasonable excuse, to comply with the direction(s), the CMA can apply to the court to enforce compliance with the direction(s). If the party (or parties) then breach the court order, this would amount to contempt of court.

- The CMA can require the infringing party or parties to pay a penalty, providing that the CMA is satisfied that the infringement was committed intentionally or negligently. Penalties cannot exceed 10 per cent of the turnover of the undertaking in question. In order to encourage whistleblowing, a leniency system exists, which can result in a reduction in the penalty due, or even total immunity (civil and/or criminal). The penalty can also be reduced if the party admits to the infringement and reaches a settlement with the CMA.

Many decisions of the CMA relating to competition law matters can be appealed to the Competition Appeal Tribunal.

**The Competition Appeal Tribunal**

The Competition Appeal Tribunal (CAT) was established by the Enterprise Act 2002 in order to replace the Competition Commission Appeals Tribunal. The CAT is headed by the President, who is usually a judge, who presides over two panels, namely (i) the panel of chairman, and (ii) the panel of ordinary members. Cases are heard by a Tribunal of three persons, namely the chairman (who must be either the President or a member from the panel of chairman) and two other persons (who can be chosen from either the panel of chairmen or the panel of ordinary members).

The principal functions of the CAT include the following:

- Certain decisions of the CMA or the sectoral regulators can be appealed to the CAT, which can then confirm, set aside or vary the original decision. This will include decisions as to whether there has been an infringement of the Chapter I or Chapter II prohibitions, or whether Arts 101 or 102 of the TFEU have been infringed.

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92 ibid s 32(3).
93 ibid s 33(3).
94 ibid s 34.
95 ibid s 36(1) and (2).
96 ibid s 36(3).
97 ibid s 36(8).
99 The application for leniency differs from a settlement agreement, in that in the former, the penalty reduction and/or immunity is granted in return for the provision of information, whereas in the latter, the reduction is granted in return for resources saved as a result of the admission that an infringement has taken place.
100 Competition Act 1998, s 46.
101 See <https://www.catribunal.org.uk>.
102 Enterprise Act 2002, s 12(1).
103 ibid s 12(2).
104 ibid s 14(1), (2) and (3). Certain procedural cases can be heard by a single person (who will be either the President, or a member of the panel of chairmen).
105 The full list of appealable decisions can be found in the Competition Act 1998, ss 46(3) and 47(1).
• Any person who has suffered loss or damage as a result of an infringement of the Chapter I or II prohibitions, or as a result of an infringement of Arts 101 or 102 of the TFEU, can bring a claim for damages before the CAT.  

• Any person aggrieved by a decision of the CMA, OFCOM, or the Secretary of State in connection to a merger or market investigation, may apply to the CAT for a review of that decision. The CAT can then dismiss the application or, if it feels that the application has merit, it can quash in whole or in part the original decision and refer it back to the original decision maker with an instruction to reconsider and make a new decision in accordance with the CAT.

• Certain decisions of OFCOM and the Secretary of State taken under the Communications Act 2003 can be appealed to the CAT.

• Certain decisions of the Gas and Electricity Markets Authority taken under the Energy Acts of 2008 and 2010 can be appealed to the CAT.

Decisions of the CAT can be appealed on a point of law, as can the amount of a penalty in penalty cases. In England and Wales, such an appeal would lie with the Court of Appeal. In Scotland, the appeal would lie with the Court of Session, and in Northern Ireland, the appeal would lie with the Court of Appeal in Northern Ireland. Permission to appeal is required from either the CAT or the relevant appellate court.

**The Serious Fraud Office**

In relation to competition law matters, the Serious Fraud Office’s (SFO) principal role is to initiate prosecutions against those individuals who are suspected of engaging in the cartel offence, or in the common law offence of conspiracy to defraud. The CMA is also empowered to bring a prosecution.

In relation to the cartel offence, the Serious Fraud Office and the CMA will usually work together in that the CMA will usually conduct the investigation (or conduct it alongside the Serious Fraud Office) and, in cases where the fraud is likely to be serious or complex, the Serious Fraud Office will undertake the prosecution of the case.

**Sectoral regulators**

Many sectors of UK industry have their own regulator (known as ‘sectoral regulators’), with the following table setting out some of the relevant sector regulators for the purposes of competition law.

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106 Competition Act 1998, s 47A.
107 Enterprise Act 2002, ss 120 and 179.
108 Communications Act 2003, s 192.
110 Competition Act 1998, s 49.
111 Ibid s 49(2)(b).
112 See <https://www.sfo.gov.uk>.
113 Enterprise Act 2002, s 190(2)(a). Note that this provision only applies to England, Wales and Northern Ireland. In Scotland, the decision to prosecute will be taken by the Lord Advocate under the Criminal Law (Consolidation) (Scotland) Act 1995.
114 Ibid s 190(2)(b).
115 For a detailed discussion of the regulation of competition law matters in industry sectors, see Richard Whish & David Bailey, *Competition Law* (9th edn, OUP 2018) ch 23.
These sector regulators have, within their relevant industry, broadly the same powers as the CMA in relation to enforcing infringements of the Chapter I and Chapter II prohibition and infringement of Arts 101 and 102 of the TFEU.¹¹⁶

In practice, the sector regulators do not use their competition law powers very often, leading the government to conclude that sectoral regulation was ‘a particular weakness in the regime.’¹¹⁷ Accordingly, the ERRA 2013 imposes a leadership role upon the CMA, which will require the CMA to (i) report annually on the use of its powers and those of sectoral regulators; and (ii) following a consultation with the relevant sectoral regulator, the CMA will determine which body should lead on a case where concurrency occurs.

**The courts**

The courts also have a vital role to play. In terms of civil actions, claims may be brought in the High Court¹¹⁸ for alleged infringements of the Chapter I and II prohibitions, as well as for infringements of Arts 101 and 102 of the TFEU. The High Court will also issue warrants to those bodies seeking to enter premises under the Competition Act 1998.¹¹⁹

Criminal cases principally lie in two areas. First, the Enterprise 2002 created the cartel offence (discussed later in this chapter) – the offence is either way, so it can be tried summarily in a magistrates’ court or on indictment in the Crown Court.¹²⁰ Second, a criminal offence is usually committed where a person refuses to comply with an order under the Competition Act 1998 requiring that person to provide information (or where such information is provided, but is falsified) or allow admission to premises for the purposes of investigating an infringement.¹²¹

Finally, as noted above, the decisions of the CAT can be appealed. In England and Wales, such an appeal would lie with the Court of Appeal. In Scotland, the appeal would lie with the Court of Session, and in Northern Ireland, the appeal would lie with the Court of Appeal in Northern Ireland.

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¹¹⁶ Competition Act 1998, s 54.
¹¹⁸ These actions will usually lie in the Chancery Division, but cases will occasionally also be heard in the Commercial Court.
¹¹⁹ Competition Act 1998, ss 28(1), 59(1), 62(1), 62A(1), and 63(1).
¹²⁰ Enterprise Act 2002, s 190(1).
**Competition Act 1998**

Prior to 1998, UK competition law was spread across a number of different pieces of legislation and enforcement was the responsibility of a number of different bodies. In 1997, the government announced that it intended to streamline the competition law provisions into one Act that was more in harmony with Arts 81 and 82 of the EC Treaty (now Arts 101 and 102 of the TFEU). The result was the Competition Act 1998 (CA 1998) which came into force on 1st March 2000. Part I of the Competition Act 1998 introduced two prohibitions (known as the Chapter I and Chapter II prohibitions) which closely resemble those found in Arts 101 and 102. To ensure as much harmony as possible between domestic and EU law, s 60 of the Competition Act 1998 provides that domestic courts should apply the 1998 Act in a manner consistent with EU law and decisions of the European courts, except in relation to those areas where there is a ‘relevant difference’ between the provisions.

**The Chapter I prohibition**

Chapter I is found in ss 1-11 of the 1998 Act, with the Chapter I prohibition itself being found in s 2(1).

**CA 1998, s 2(1)**

Subject to section 3, agreements between undertakings, decisions by associations of undertakings and concerted practices which-

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

It is immediately apparent that the wording of s 2(1) is virtually identical to that of Art 101(1) of the TFEU. The result of this, and the fact that s 60 requires that UK courts interpret and apply the 1998 Act in a manner that is consistent with EU law, means that the discussion of the various terms and phrases used in Art 101 will also apply here and so these terms need not be discussed further. The penalty for breaching s 2(1) is the same as for breaching Art 101, namely that the agreement or decision is void. As with Art 101, the de minimis rule applies and so-called ‘small agreements’ have limited immunity in that are not subject to the financial penalties that can be imposed by the CA 1998, but they are subject to any other penalties. A small agreement is one between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding one during which the infringement occurred does not exceed £20 million.

What does need to be discussed is the fact that s 2(1) expressly states that it is subject to s 3. Section 3 provides that three broad categories of agreements are excluded from the operation of s 2(1), namely:

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122 Indeed, s 2(2) of the 1998 Act contains examples of agreements and practices that could breach s 2(1) and this list is identical to the list of examples found in Art 101(1).

123 Competition Act 1998, s 2(4).

1. Schedule 1 of the CA 1998 provides that certain mergers and concentrations are excluded from the operation of s 2(1).
2. Schedule 2 of the CA 1998 provides that certain agreements that are subject to ‘competition scrutiny’ under other pieces of specified legislation are excluded from the operation of s 2(1).
3. Schedule 3 of the CA 1998 relates to ‘general exclusions’ and lists a number of agreements and situations to which the Chapter I prohibition will be excluded (e.g. the prohibition will not apply to an agreement that is made in order to comply with a legal obligation).\textsuperscript{125}

In addition to these excluded agreements, the CA 1998 Act also provides for two types of exemptions. First, s 6 of the CA 1998 provides for block exemptions, which are granted by the Secretary of State upon a recommendation from the CMA. Any agreement subject to a block exemption will be exempt from the operation of the Chapter I prohibition.\textsuperscript{126} Second, s 10 of the CA 1998 provides for parallel exemptions, which are generally those agreements and decisions that are exempt from Art 101(1) under EU law (either by virtue of a EU Regulation or a decision of the Commission). Any agreement subject to a parallel exemption will be exempt from the operation of the Chapter I prohibition.\textsuperscript{127}

\textit{The Chapter II prohibition}

Chapter II is found in ss 17-19 of the 1998 Act, with the Chapter II prohibition itself being found in s 18(1).

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\begin{tabular}{|l|}
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\textbf{CA 1998, s 18}  \\
\textbf{Subject to s 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.}  \\
\hline
\end{tabular}
\end{center}

It is clear that s 18(1) is very similar to the prohibition found in Art 102 of the TFEU.\textsuperscript{128} The result of this, and the fact that s 60 requires that UK courts interpret and apply the 1998 Act in a manner that is consistent with EU law, means that the discussion of the various terms and phrases used in Art 102 will also apply here and so these terms need not be discussed further.

There are, however, some elements relating to s 18 that do need to be discussed. Section 18(3) provides that a ‘dominant position’ means ‘a dominant position within the United Kingdom’ and it then goes on to define the ‘UK’ as ‘the United Kingdom or any part of it.’ It will be recalled that, in relation to Art 101, the undertaking had to occupy a dominant position in the internal market or within a substantial part of it. The requirement for substantiality is not repeated in s 18 and so an undertaking that occupies a dominant position in a small part of the UK will still be subject to the Chapter II prohibition.

\begin{flushright}
\footnotesize\textsuperscript{125} CA 1998, Sch 3(5)(1).
\textsuperscript{126} CA 1998, s 6(3).
\textsuperscript{127} CA 1998, s 10(1).
\textsuperscript{128} Indeed, s 18(2) of the 1998 Act contains examples of conduct that could breach s 18(1) and this list is identical to the list of examples found in Art 102.
\end{flushright}
Section 19 provides that two broad categories of conduct are excluded from the operation of s 2(1), namely:

1. Schedule 1 of the CA 1998 provides that certain mergers and concentrations are excluded from the operation of s 18(1).

2. Schedule 3 of the CA 1998 relates to ‘general exclusions’ and lists a number of agreements and situations to which the Chapter II prohibition will be excluded (e.g. the prohibition will not apply to an agreement that is made in order to comply with a legal obligation).\(^{129}\)

It is clear that these two categories are also excluded from the Chapter I prohibition (although some of the specific exclusions contained within these two Schedules only apply to Chapter I or Chapter II).

**Enterprise Act 2002**

The Enterprise Act 2002 (EA 2002) is an extremely important piece of legislation in relation to many different areas of the law. For the purposes of this chapter, it is important for four reasons. First, as discussed above, the Act abolished the office of Director General of Fair Trading\(^{130}\) and transferred the powers of that office to a newly-established body entitled the Office of Fair Trading (OFT).\(^{131}\) Second, it established the Competition Appeal Tribunal in order to replace the Competition Commission Appeals Tribunal.\(^{132}\) Third, the Act created a new standalone criminal cartel offence. Fourth, the Act granted the courts the power to issue competition disqualification orders. As the role of the OFT/CMA has already been discussed, the cartel offence and disqualification orders will be discussed here.

**The cartel offence**

The provisions discussed thus far impose civil liability only in respect of anti-competitive practices. There were concerns that, in relation to certain anti-competitive practices, civil liability was insufficient and that stronger measures should be introduced. Accordingly, in May 2001, a joint report of the DTI and Treasury stated:

> Although the Competition Act 1998 strengthens the deterrent effect against anti-competitive behaviour, the project team is concerned that it may not go far enough. In particular, the penalties for engaging in cartels may not be enough to deter such action. The project team concludes that American, and other experience suggests that there is a strong case for introducing criminal penalties, including custodial sentences, for those who engage in cartels alongside a new civil sanction of director’s disqualification.\(^{133}\)

Following on from this recommendation, the OFT commissioned a report (known as the Penrose Report) to examine ‘the legislative and procedural changes that would be necessary to enable the Office of Fair Trading to operate a regime in which criminal sanctions would be

\(^{129}\) CA 1998, Sch 3(5)(1).

\(^{130}\) Enterprise Act 2002, s 2(2)

\(^{131}\) Enterprise Act 2002, s 1(1). As noted, the OFT has since been abolished and replaced by the CMA.

\(^{132}\) Enterprise Act 2002, s 12(1).

\(^{133}\) HM Treasury & Department of Trade and Industry, ‘The UK’s Competition Regime’ (HM Treasury/DTI 2001) para 1.11.
applied against individuals who had been found to have knowingly engaged in cartel activity.\textsuperscript{134} The result was Pt 6 of the Enterprise Act 2002 which introduced a cartel offence into English law.

Before the offence itself is discussed, a few points should be noted. First, the EA 2002 is not retroactive, so cartel activity engaged in prior to the enactment of the EA 2002 will not result in the commission of the offence. Second, the offence is completely independent of the competition provisions found in the TFEU and Competition Act 1998, meaning that a breach of the civil provisions will not automatically result in a prosecution for the cartel offence. However, an undertaking may be found liable under the TFEU or Competition Act 1998 and certain individuals involved in those undertakings may also be found guilty of the cartel offence in separate proceedings. This is demonstrated in the following case, which was the first prosecution brought under the EA 2002.

### The Marine Hoses Case

**FACTS:** Eleven organizations were involved in the supply of marine hoses, which were used to offload crude oil from offshore facilities onto vessels and onshore facilities. The European Commission launched a surprise inspection and discovered a scheme to manipulate tenders amongst the various organizations. US authorities also obtained details of the cartel by secretly recording the conversations of the cartel members who discussed the scheme. Under this scheme, when an organization received a customer enquiry, the enquiry was reported to the cartel coordinator, who would then decide which of the eleven organizations would win the tender (this organization was known as the ‘champion’). The organizations involved would then ensure that the champion won the tender by deliberately agreeing quotes that were higher than that offered by the champion. The European Commission commenced proceedings against the organizations concerned for breaches of Art 101 of the TFEU and the OFT prosecuted three individuals involved in those organizations for the cartel offence.

**HELD:** In June 2008, the Crown Court held that the three individuals were each found to have committed the cartel offence and were sentenced to between two and three years imprisonment,\textsuperscript{135} although the sentences were reduced slightly on appeal to between 20 months and two-and-a-half years.\textsuperscript{136} The three individuals were also disqualified from acting as company directors for periods of between five to seven years.

In January 2009, the European Commission held that Art 101 had been breached and imposed collective fines of €131 million on ten of the eleven organizations concerned.\textsuperscript{137} The fines were so substantial because the evidence discovered by the Commission indicated that the cartel had been in place for 19 years and other anti-competitive agreements had been in place for longer.

\textsuperscript{134} Sir Anthony Hammond and Roy Penrose, ‘Proposed Criminalisation of Cartels in the UK’ (OFT 2001) Foreword.

\textsuperscript{135} R v Whittle, Brammar & Allison (Southwark Crown Court, 10 June 2008).


\textsuperscript{137} Commission Decision of the 28 January 2009 relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (Case COMP/39.406 — Marine Hoses) (2009/C168/05). One of the organizations (Yokohama Rubber Co Ltd) provided information on the cartel activity and so the fine to be imposed on Yokohama was reduced by 100 per cent.
The cartel offence can be found in s 188(1) of the EA 2002.

**EA 2002, s 188(1)**

An individual is guilty of an offence if he agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).

Two points should be noted regarding s 188(1). First, the provision makes clear that only an individual (i.e. a natural person) can be found guilty of the offence. Accordingly, undertakings and other organizations (e.g. companies, limited liability partnerships, etc) cannot be prosecuted for the cartel offence. Second, the mens rea requirement of the offence has recently been amended. Before the 25 April 2013, an individual would only be found guilty of the cartel offence if he dishonestly agreed to enter into certain arrangements. Unfortunately, the dishonesty requirement made it more difficult to commence and obtain a prosecution, and introduced significant uncertainty into the law.\(^{138}\) Accordingly, following a consultation, the government decided that:

removing the ‘dishonesty’ element from the criminal cartel offence will improve enforceability, and increase deterrence, bringing levels closer to what was intended when the offence was introduced. While levels of prosecution were never expected to be high, they were certainly expected to be higher than they have been to date.\(^{139}\)

The removal of the dishonesty requirement was completed with the passing of the Enterprise and Regulatory Reform Act 2013, s 47(2) of which provides that the word ‘dishonestly’ shall be omitted from s 188(1) of the EA 2002. The prosecution will now only need to show that the defendant intended to enter into the arrangement and that he knew it would have the intended outcome.

Section 188(1) states that the arrangement in question must involve at least two undertakings (A and B), but it does not specify the types of arrangement that can amount to cartel activity. The Government, in one of three White Papers covering the EA 2002, stated that the cartel offence ‘will only cover hard-core cartels only’\(^{140}\) and this is reflected in s 188(2), which specifies the types of arrangement that can amount to cartel activity under s 188(1). These arrangements are as follows:

- **Price fixing:** This occurs where A and B enter into an arrangement which directly or indirectly fixes a price for the supply by A or B of a product or service in the UK.\(^{141}\) Price fixing will not occur where A or B are supplying the product to each other.
- **Limiting of supply:** This occurs where A and B agree to limit or prevent the supply of a product by A or B in the UK.\(^{142}\)

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\(^{138}\) For a criticism of the dishonesty requirement, see Department for Business, Innovation & Skills, ‘A Competition Regime for Growth: A Consultation on Options for Reform’ (BIS 2011) paras 6.6 – 6.18.

\(^{139}\) Department for Business, Innovation & Skills, Growth, ‘Competition and the Competition Regime: Government Response to Consultation’ (BIS 2012) para 7.7.


\(^{141}\) EA 2002, s 188(2)(a) and 188(3)(a).

\(^{142}\) ibid s 188(2)(b) and 188(3)(b).
- **Limiting of production**: This occurs where A and B agree to limit or prevent the production of a product by A or B in the UK.  

- **Market-sharing**: This occurs (i) where A and B divide between them the supply in the UK of a product or service to a customer(s); or (ii) where A and B divide between them customers for the supply in the UK of a product or service.  

- **Bid-rigging**: This occurs where, in response to a request for bids for the supply of a product or service in the UK, or for the production of a product in the UK, (i) A but not B may make a bid, or; (ii) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangement (the *Marine Hoses* case discussed above is a good example of this).

Section 188(2) specifies which types of arrangements will result in the cartel offence being committed, but s 188(8) states that s 188 is subject to s 188A, which specifies those circumstances in which the cartel offence will not be committed. These include (i) where customers are given relevant information about the arrangements before they enter into agreements for the supply of products or services; (ii) in the case of bid-rigging arrangements, where the person requesting bids is given relevant information about them at or before the time when a bid is made; and (iii) where the agreement is made in order to comply with a legal requirement.

Section 188B provides for three defences to the cartel offence, namely:

1. That, at the time of the making of the agreement, the defendant did not intend that the nature of the arrangements would be concealed from customers at all times before they enter into agreements for the supply of the product or service.
2. That, at the time of the making of the agreement, the defendant did not intend that the nature of the arrangements would be concealed from the Competition and Markets Authority.
3. That, before making the agreement, the defendant took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.

Currently, prosecutions may be brought by the Serious Fraud Office or the CMA, with the latter able to conduct an investigation if there are reasonable grounds for suspecting that an offence under s 188 has been committed. Upon commencing an investigation, the CMA is then granted significant powers in relation to investigation, including requesting persons to provide information or documentation, and the ability to enter premises with a

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143 ibid s 188(2)(c) and 188(3)(c).
144 ibid s 188(2)(d) and (e).
145 ibid s 188(2)(f) and 188(5).
146 ibid s 188A(1)(a).
147 ibid s 188A(2)(b).
148 ibid s 188A(3).
149 ibid s 188B(1).
150 ibid s 188B(2).
151 ibid s 188B(3).
152 ibid s 190(2).
153 ibid s 192(1).
154 ibid s 193.
warrant. Persons who do not comply with the CMA’s requests, who provide falsified information, or who attempt to conceal or destroy information shall be guilty of an offence.

Commission of the offence is punishable, on indictment, to imprisonment for a term not exceeding five years and/or a fine. On summary conviction, the maximum penalty is six months imprisonment and/or a fine not exceeding the statutory maximum. However, an individual who has engaged in cartel activity can avoid prosecution via the leniency process contained in s 190(4). This provision permits the CMA to issue ‘no-action letters’ which will grant immunity from prosecution to individuals engaged in cartel activity. However, no-action letters will only be granted if certain conditions are satisfied, namely that the individual concerned must:

- admit participation in the cartel offence;
- provide the CMA with all the information available to him regarding the existence and activities of the cartel;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any criminal proceedings resulting from the investigation;
- not have taken steps to coerce another undertaking to take part in the cartel, and;
- refrain from further participation in the cartel from the time of its disclosure to the CMA (unless the investigating authority directs otherwise).

Even if the above conditions are met, the CMA will not grant a no-action letter if it already has, or is in the course of gathering, sufficient information to bring a successful prosecution.

**Disqualification orders**

In a White Paper relating to what would become the EA 2002, the Department of Trade and Industry stated that:

> The Government believes that it is also in the public interest that directors who have engaged in serious breaches of competition law should be exposed to the possibility of disqualification on that ground alone. It therefore proposes to legislate to enable the OFT to seek a court order disqualifying a director from acting in the management of a limited liability company where serious breaches of competition law have been found.

Section 204(2) of the EA 2002 inserted a new provision into the Company Directors Disqualification Act 1986 (CDDA 1986) which provides that the court must (not may) make a competition disqualification order (CDO) against a person providing that two conditions are met:

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155 ibid s 194.
156 ibid s 201.
157 ibid s 190(1)(a).
158 ibid s 190(1)(b).
160 ibid para 3.4.
1. First, an undertaking, which is a company and of which the person is a director, has committed a breach of competition law. For this purpose, a breach of competition law means infringing the Chapter 1 or Chapter 2 prohibitions in the Competition Act 1998, or infringing Arts 101 or 102 of the TFEU.

2. Second, the court considers that the person’s conduct as a director makes him unfit to be concerned in the management of a company.

If the court decides to impose a CDO, then the person concerned will be disqualified from acting as a company director for a period specified by the court, with the maximum period being 15 years. During the period in which the CDO is in effect, it will constitute a criminal offence for the person concerned to act as a company director, and that person will be personally liable for the relevant debts of the company.

Chapter summary

- All EU Member States are required to enforce EU competition law. The UK is to withdraw from the EU.
- The bodies responsible for creating, reviewing, interpreting, and enforcing EU competition law are (i) the Council of the European Union; (ii) the European Commission; (iii) the Court of Justice of the European Union; and (iv) the domestic courts of the Member States.
- The principal EU competition law provisions can be found in the competition chapter of the TFEU, namely Chapter 1 of Title VII. In particular, the key prohibitions are found in Arts 101 and 102.
- The responsibility for investigating and enforcing UK competition law is placed upon the competition authorities, namely (i) the Competition and Markets Authority; (ii) the Competition Appeal Tribunal; (iii) the Serious Fraud Office, and; (iv) the various sectoral regulators.
- A court must make a competition disqualification order against a person if that person’s company committed a breach of competition law, and the court considers that that person’s conduct makes him unfit to be a director of a company.

Further reading


- As the title suggests, this text focuses on EU competition law. It provides an excellent selection of materials along with commentary.

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162 CDDA 1989, s 9A(2).
163 ibid s 9A(4).
164 ibid s 9A(3).
165 ibid s 9A(9).
166 ibid ss 1(1) and 13.
167 ibid s 15.
• Provides a comprehensive account of UK, EU and international competition law.

• Provides an accessible account of all the competition law issues discussed in this chapter (and many others).

Below are the websites of the principal bodies that investigate and enforce competition law. In these websites, a wealth of useful and up-to-date information can be found.

• Competition Appeal Tribunal: [www.catribunal.org.uk](http://www.catribunal.org.uk)
• Court of Justice of the European Union: [www.curia.europa.eu](http://www.curia.europa.eu)
• DG-COMP: [http://ec.europa.eu/dgs/competition/index_en.htm](http://ec.europa.eu/dgs/competition/index_en.htm)
• European Commission: [www.ec.europa.eu/competition](http://www.ec.europa.eu/competition)
• Serious Fraud Office: [www.sfo.gov.uk](http://www.sfo.gov.uk)