

INTELLECTUAL PROPERTY & ANTITRUST

United Kingdom



Intellectual Property & Antitrust

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Quick reference guide enabling side-by-side comparison of local insights, including into intellectual property law, the nexus between competition and IP rights, and consideration of industry standards; competition law, including such issues as interactions with copyright exhaustion or first sale doctrines; merger review; specific examples of competition law violations; remedies; economics and application of competition law; recent cases, remedies and sanctions; and other recent trends.

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INTELLECTUAL PROPERTY

Intellectual property law

Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

IP rights in the UK are protected by a combination of UK and EU derived legislation, as well as UK and EU case law. After the Brexit transition period which ended on 31 December 2020, EU law ceased to apply to the UK. EU Regulations only continue to apply in UK domestic law by virtue of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020 (the EU Withdrawal Act). The EU Withdrawal Act includes provisions which converted existing directly applicable EU law into domestic UK law by way of statutory instruments. This mainly applies to EU Regulations, which would otherwise have ceased to apply after the Brexit transition period, and also to statutory instruments implementing EU Directives, where the statutory instruments were adopted pursuant to the European Communities Act 1972. In addition, a series of statutory instruments were implemented in advance of the end of the Brexit transition period to enable EU retained law to work effectively. At the time of writing, EU case law prior to 1 January 2021 is still binding on UK courts, although the Supreme Court and Court of Appeal have the ability to depart from pre-exiting EU case law if they feel it is 'appropriate to do so'.

Substantive national patent law across Europe has been partially harmonised by the European Patent Convention 1973, which was implemented nationally in the UK through the UK Patents Act 1977 (as amended). Patent protection lasts for 20 years, and can be extended for medicinal and plant protection products by a supplementary protection certificate (SPC). Under a retained version of EU Regulation 469/2009 (Retained SPC Regulation), for medicinal products it can be extended by up to five-and-a-half years, and under a retained version of EU Regulation 1610/96, for plant protection products it can be extended by up to five years. UK patent law, including the patent enforcement system in the UK, has remained unchanged. Statutory instruments came into effect at the end of the transition period on 31 December 2020 and brought EU legislation into UK law as far as possible, to maintain current systems and processes.

The process of applying for a UK SPC, the timescale, documentation, fees, conditions for seeking an SPC and the scope of protection have also remained essentially the same. However, there are some important changes relating to the territory of protection and the date of calculation of the duration of SPCs. SPC applications are now required to be based on a UK, Great Britain (GB) and/or Northern Ireland (NI) marketing authorisation (MA), and will be territory-specific to the underlying MA(s). The consequence of this is that the territorial extent of an SPC will extend only to the territory where the MA(s) allows the product to be sold. In circumstances where the territorial scope of an SPC extends only to GB or NI, the scope can be extended to the whole of the UK if, before an SPC takes effect, a valid GB or NI MA is granted in relation to the same product (where such MA is the first MA for that product).

The duration of both old and new UK SPCs is determined by reference to the earliest MA in the European Economic Area (EEA) and the UK. This means that if the MA had been granted in an EEA member state before the grant of the UK MA, the term of the UK SPC will run from the date of the earlier EEA MA, thereby limiting the effective period of exclusivity in the UK.

In addition, from 1 January 2021:

- authorisations from the European Medicines Agency, for the purposes of SPCs, were converted into equivalent UK authorisations; and
- new applications for a six-month paediatric extension to SPCs are considered based on provisions in the UK Human Medicines Regulations 2012.

With effect from 1 January 2021, the Retained SPC Regulation has provided for a revised SPC manufacturing waiver regime in order for it to work effectively in the UK. The UK SPC waiver allows a UK manufacturer of generics and biosimilar products to manufacture medicines protected by an SPC without the consent of the SPC holder, either for exports outside the UK, the Isle of Man and the EU (where the protection has either expired, or does not exist) or to make and stockpile medicines during the six months before the expiry of the SPC, for launch in the UK, the Isle of Man or the EU on day one of SPC expiry, or both. The waiver applies to SPCs which were applied for on or after 1 July 2019, but not to SPCs that took effect before 1 July 2019. In cases where an SPC application was filed before 1 July 2019 but did not take effect until after 1 July 2019, the waiver has only applied from 2 July 2022.

Registered trade marks are protected under the UK Trade Marks Act 1994 (as amended). Since 1 January 2021, EU trade marks (EUTMs) no longer cover the UK. Protection for unregistered trade marks can last indefinitely; the same applies to registered trademarks as long as the registrations are successfully maintained and renewed every 10 years.

Registered and unregistered designs are protected under the UK Copyright, Designs and Patents Act 1988 (CDPA, as amended) and Registered Designs Act 1949 (as amended). The duration of protection varies from three to 25 years, depending on the nature of the right.

Prior to the end of the Brexit transition period, the UK Parliament enacted Brexit-related amendments to design and trade mark law. As EUTMs and registered Community designs (RCDs) ceased to cover the UK after 31 December 2020, an EUTM or a RCD was automatically cloned and a comparable UK trade mark registration or design registration was created that retained the same priority, filing, seniority and renewal dates as the equivalent EU right.

A new UK right called the supplementary unregistered design ('SUD') has been created to replace the former UK part of the equivalent EU unregistered Community design ('UCD'). The SUD intends to mimic the UCD in the UK with the same scope and duration following the loss of the UCD, protecting the 2D and 3D appearance of the whole or part of a product for a period of three years. Given that UK and EU unregistered designs are now separate rights, it is important for UK businesses, nationals or residents to consider where to first disclose designs if they wish to rely on unregistered design rights either in the UK or the EU (or both). This is because a SUD will be established by a first disclosure in the UK or another qualifying country. Notably, first disclosure in the EU will not establish a SUD right in the UK. There is an unresolved question as to whether disclosure on the same day in the UK and the EU will create a separate unregistered design right in both territories.

Copyright protection is governed by the CDPA. The duration of copyright protection varies, depending on the nature of the work. Literary, dramatic, musical and artistic works are usually protected for 70 years from the end of the year in which the author dies. Specific aspects of copyright law have been harmonised by a number of EU Directives which form part of retained EU law. There is, however, an important exception. The Directive on Copyright in the Digital Single Market 2019/790 has not been implemented into UK law, as it came into force after 31 January 2020. The deadline for transposing this directive into national law was 7 June 2020 but the UK government decided not to implement it in the UK. Prior to Brexit completion date, the UK government implemented statutory instruments which removed or corrected references to the EU, EEA or member states in the national legislation to preserve the effect of UK copyright law.

Databases may be protected as copyright works under the CDPA, and by the sui generis database right under EU Directive 96/9 (the Database Directive) as implemented in the CDPA. Copyright in a database lasts for 70 years after the creator's death, and the sui generis database right for 15 years, from the date the database was made.

UK citizens, residents, and businesses are no longer eligible to be assigned or to own database rights in the EEA for databases created on or after 1 January 2021. UK owners of databases that are created on or after this date need to consider alternative means of protection in the EEA, such as licensing arrangements with persons who are eligible to be owners of such rights in the EEA or relying on copyright protection. Database rights that existed in the UK or EEA before 1 January 2021 (whether held by UK or EEA persons or businesses) continue to exist in the UK and EEA for the rest of their protection duration. UK legislation has been amended so that only UK citizens, residents, and businesses

are eligible to own database rights in the UK for databases that are created on or after 1 January 2021.

Trade secrets and confidential information are protected by the common law of breach of confidence, and trade secrets are also protected by EU Directive 2016/943 .

The enforcement of IP rights across Europe has been harmonised to some extent by Directive 2004/48 (the Enforcement Directive) which is still applicable in the UK as retained EU law. In addition to restrictions arising out of competition law, key restrictions on the ability to enforce IP rights include the risk of incurring liability for unjustified threats of IP infringement, the law of which was significantly reformed in the UK by the Intellectual Property (Unjustified Threats) Act 2017 , and specific defences to infringement and restrictions on available remedies for each right.

The formalities for assignments and licences, and the effect of failing to register a transaction in relation to a registered right, vary between different rights and are provided for in the relevant legislation.

Overall, the protections afforded under UK IP law to trade marks, copyright, designs, patents and trade secrets exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Law stated - 24 October 2022

Responsible authorities

Which authorities are responsible for granting, administering or enforcing IP rights?

The UK Intellectual Property Office (IPO) is responsible for the grant and administration of UK patents, SPCs, trade marks, and registered designs. The European Patent Office (EPO) is responsible for the prosecution (including post-grant opposition) of European patents which, when granted, can designate the UK as a territory where the patent is validated. The UK IPO and EPO are not EU institutions and their operation are unaffected by Brexit.

Since 1 January 2021, new UK rights have been created to replace EUTMs and RCDs. In addition, international trade mark and design right registrations designating the EU are no longer valid in the UK and the UK must be designated specifically.

The Trading Standards Authorities play a role in investigating IP infringement and conducting prosecutions for criminal IP enforcement, and the UK customs and border authorities can take action to assist rights owners in IP enforcement, but IP enforcement is primarily via civil litigation in the courts.

Law stated - 24 October 2022

Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

IP rights are primarily enforced in the UK via civil court proceedings, and the High Court is the most common venue. IP proceedings in the High Court are heard in the Chancery Division, and different specialist lists are available:

- the Intellectual Property Enterprise Court (IPEC) can hear any IP claim of relatively low complexity and value: the IPEC is generally suitable for claims which can be tried in two days or less, damages are capped at £500,000 and recoverable legal costs are subject to a cap of £50,000;
- the Patents Court can hear claims relating to patents, registered designs, semiconductor topography rights and plant varieties. There is no cap on damages or recoverable legal costs; and

- all other IP claims can be heard in the Intellectual Property List of the Chancery Division, of which the Patents Court and IPEC are sub-lists.

Decisions of the English High Court can be appealed (with permission) to the Court of Appeal and the Supreme Court. Since 1 January 2021, with some limited exceptions relating to Northern Ireland, questions on EU law are no longer referred to the Court of Justice of the European Union (CJEU).

The UK IPO offers a mediation service, which can mediate infringement disputes relating to all types of IP, and can also provide a non-binding opinion on infringement of a patent or supplementary protection certificate. However, the UK IPO cannot make a binding decision on infringement of any IP right.

Law stated - 24 October 2022

Remedies

What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

The remedies available in a civil action for IP infringement (in line with the Enforcement Directive) are an injunction to restrain infringement, an order for delivery up or destruction of infringing goods, damages or an account of profit, and a declaration that the right is valid and has been infringed. In addition, the UK courts have broad jurisdiction to make declarations that will serve a useful purpose (eg Arrow declarations and declarations of non-essentiality in the case of fair, reasonable, and non-discriminatory (FRAND) disputes). Copyright, registered designs and trademark infringement can also give rise to criminal liability in certain circumstances; it is theoretically possible to pursue a private prosecution, but not common.

IP holders can also request the UK customs authorities to detain suspected infringing goods.

Law stated - 24 October 2022

Nexus between competition and IP rights

Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

UK IP and competition legislation does not address the interplay between competition law and IP law, such that this is left to the courts to determine. For example, UK IP case law has addressed the interplay between competition and IP law in cases where an alleged infringer asserts that IP rights (IPRs) in the relevant goods have been exhausted, or that the IP holder's behaviour in enforcing its rights is anticompetitive.

The body of case law on the nexus between IPRs and competition law is largely driven by EU competition cases. For example, there are a number of European cases in respect of reverse payment patent settlement agreements. There are also several cases on when the use of IPRs can amount to abuse of dominance.

Law stated - 24 October 2022

Patent cooperation treaties and other agreements

Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

The UK is a signatory to the WIPO Patent Cooperation Treaty, the Madrid Protocol, the Agreement on Trade-Related

Aspects of Intellectual Property Rights (TRIPS) and the European Patent Convention (of which the UK is still a member). Whilst the UK was a signatory to the Agreement on a Unified Patent Court, the UK government decided in July 2020 to withdraw its ratification of this agreement. Since leaving the EU, the UK no longer qualifies for membership to the Unified Patent Court.

Law stated - 24 October 2022

Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

It is theoretically possible for a dominant company to abuse its market power by engaging in deceptive practices. In such a case, the remedies would be the same as for other breaches of competition law.

The Consumer Protection From Unfair Trading Regulations 2008 (CPUT) prohibit unfair commercial practices, including copycat packaging (promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer). CPUT is enforced by public authorities and can be relied on by consumers, but does not give rise to a right in favour of affected businesses.

Law stated - 24 October 2022

Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures (TPMs) and digital rights management (DRM) enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

The UK has implemented EU Directive 2001/29, which requires member states to provide legal protection against the circumvention of TPMs and the removal or alteration of electronic rights management information, and ensure that the use of TPMs does not prevent the exercise of exceptions to copyright.

There have been no recent cases where TPM or DRM protection has been challenged as a breach of competition law. That said, as with other IPRs, it is theoretically possible for TPM or DRM-related conduct to be investigated and prohibited if its object or effect restricts competition.

Law stated - 24 October 2022

Industry standards

What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

The European Commission has published guidelines (2011/C 11/01), which are applied in the UK, on the applicability of article 101 of the Treaty on the Functioning of the European Union (TFEU) to standardisation and horizontal cooperation agreements. These provide that, where technology is adopted as an industry standard, the agreement must provide for access on FRAND terms or it could be a breach of competition law.

The Commission decisions in *Motorola* (C-39985/2014) and *Samsung* (C-350/08) of April 2014 were the first to provide some guidance on the compatibility of standard-essential patent (SEP) injunctions with the EU competition rules. The Commission recognised that seeking an injunction is a legitimate remedy against a patent infringer, but it held that applying for an injunction based on SEPs may be an abuse of a dominant position where the patent holder has given a voluntary commitment to license on FRAND terms and where the injunction is sought against a licensee that is willing to enter into a licence agreement on FRAND terms. The CJEU's judgment in *Huawei v ZTE* (C-170/13) in July 2015 clarified the circumstances in which an injunction can and cannot be sought without infringing competition law and sets out a general roadmap of behaviour for both parties.

In August 2020 the Supreme Court handed down the long-awaited judgment in the joint appeal of *Unwired Planet International Ltd v Huawei Technologies Co Ltd & Anor* and *Huawei Technologies Co Ltd & Anor v Conversant Wireless Licensing SARL & ZTE Corporation* [2020] UKSC 37. The Supreme Court dismissed both appeals and upheld the decisions of the Court of Appeal and the High Court holding that:

- the English Court has the jurisdiction and may properly exercise its power, without both parties' agreement to: (1) grant an injunction in respect of a UK patent that is an SEP unless the implementer of the patented invention enters into a global licence of a multinational patent portfolio; and (2) determine the terms of that licence. Whilst the national courts have the jurisdiction to determine validity and infringement of national patents, a national court such as the UK court is empowered under the IPR policy of the European Telecommunications Standard Institute (ETSI) to determine FRAND. An implementer such as Huawei would remain free to challenge a particularly important national patent and seek a change in royalties should that be successful;
- the FRAND undertaking under ETSI's IPR Policy is a single composite obligation instead of three distinct obligations separately (ie, 'fair'; 'reasonable'; and 'non-discriminatory' individually and separately). There is no requirement for SEP owners to grant licences on terms equivalent to the most favourable licence terms to all similarly situated licensees; and
- the Supreme Court affirmed that there is no mandatory requirement to follow the protocol set out by the CJEU in its judgment in *Huawei v ZTE* to avoid infringing article 102 for behaving in an abusive manner. Seeking a prohibitory injunction without notice or prior consultation with the alleged infringer will infringe article 102. To avoid infringing article 102, the nature of the notice or consultation required before a SPE owner brings an action for a prohibitory injunction will depend on the circumstances of the case.

In subsequent years, as a consequence of this decision, the English courts continue to be a leading forum for resolving global SEP FRAND disputes.

Law stated - 24 October 2022

COMPETITION

Competition legislation

What statutes set out competition law?

UK competition law is contained in the following key statutes: the Competition Act 1998, the Enterprise Act 2002, the Enterprise and Regulatory Reform Act 2013 and the Consumer Rights Act 2015.

The provisions of Chapter I (prohibiting anticompetitive agreements) and Chapter II (prohibiting abuse of dominance) of the Competition Act effectively mirror the EU equivalents found in articles 101 and 102 of the Treaty on the Functioning of the European Union, respectively (for the moment, at least). Following the end of the Brexit transition period on 1 January 2021, section 60A of the Competition Act provides that the UK courts must ensure consistency between UK competition law and pre-Brexit EU competition case law, although the courts may depart from pre-Brexit EU competition case law if it is appropriate in light of specified circumstances. The extent of any future divergence

between EU and UK competition law is unclear.

The Enterprise Act contains the UK's merger control provisions. The UK operates a voluntary system for merger notifications.

The Enterprise Act also contains the cartel offence, a criminal law offence potentially affecting individuals involved in price-fixing, market sharing, bid rigging or output limitation.

Note that the National Security and Investment Act 2021 introduced a new (mandatory and voluntary) regime for transactions that may have an impact on national security.

Law stated - 24 October 2022

IP rights in competition legislation

Do the competition laws make specific mention of any IP rights?

No. UK competition law does not make specific reference to IP rights (IPRs).

However, agreements that fall within one of the EU block exemptions will be exempt from the application of the Chapter I provisions because all EU block exemption regulations (except the new Vertical Block Exemption Regulation) have been preserved in UK law by the Competition (Amendment etc.) (EU Exit) Regulations 2019. A number of block exemptions make specific reference to IPRs:

- the Technology Transfer Block Exemption Regulation (Commission Regulation (EU) No. 316/2014) (TTBER);
- the R&D Block Exemption Regulation (Commission Regulation (EU) No. 1217/2010); and
- the Specialisation Block Exemption Regulation (Commission Regulation (EU) No. 1218/2010).

In addition, the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022/516) has replaced the Vertical Agreements Block Exemption (Commission Regulation (EU) No. 330/2010) on 1 June 2022, the latter having expired on 31 May 2022. The new UK block exemption contains an equivalent provision relating to IPRs corresponding with that contained in both the old and the new EU Vertical Block Exemption Regulations. The Competition and Markets Authority's (CMA) guidance for the new UK block exemption now acknowledges that with respect to a restriction in a vertical agreement that only concerns exports outside the UK or imports/re-imports from outside the UK, the CMA is unlikely to regard it as having the object of restricting competition within the UK; it would carry out an effects analysis instead. This mirrors the equivalent updated guidance for the EU.

Law stated - 24 October 2022

Review and investigation of competitive effects from exercise of IP rights

Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

The competition authority in the UK is the CMA and it reviews and investigates compliance with competition law. The CMA's remit includes the review and control of the acquisition, sale or exercise of IPRs insofar as they affect competition.

Following the end of the Brexit transition period, the European Commission no longer has concurrent jurisdiction over conduct taking place in the UK that may have an effect on trade between EU member states. However, EU competition law still applies to conduct that takes place outside the EU (including in the UK) that is implemented in the EU or on the basis of the qualified effects doctrine (namely that the jurisdiction of EU competition law can be established where anticompetitive conduct outside the EU has substantial, immediate and foreseeable effects on the internal market).

The CMA applies and enforces the Chapter I and II provisions concurrently with the sector regulators in relation to their respective areas. There are a number of sector regulators, for example: Ofgem (gas and electricity), Ofwat (water), Ofcom (telecommunications and post), ORR (rail and road), CAA (airport and air traffic), NHS Improvement (healthcare in England), the Financial Conduct Authority and the Payments System Regulator (financial services and payment systems). They can investigate potential breaches of competition law, impose fines, impose interim measures and give directions to bring infringements to an end. Both the relevant regulator and the CMA are likely to be involved in a Competition Act complaint in relation to a regulated industry.

In addition, the Department for Business, Energy and Industrial Strategy now has jurisdiction to review transactions that may raise national security concerns under the National Security and Investment Act 2021.

The Competition Appeal Tribunal (CAT) is a specialist competition tribunal which hears appeals against the decisions of the CMA and the sector regulators made under the Competition Act. It also hears appeals from merger and market investigation cases. An appeal from the CAT can be made to the Court of Appeal. Follow-on and standalone claims for competition law damages can be raised in the High Court (and the Court of Session in Scotland) and in the CAT.

Law stated - 24 October 2022

Competition-related remedies for private parties

Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

Competition-related damages in respect of IPRs can be recovered in the same way as for breaches of competition law generally.

Private enforcement of competition-related damages comes in two forms: follow-on and standalone actions. Follow-on cases are claims for damages where the infringement of competition law has already been established by a competition authority (such as the Commission or the CMA). Commission decisions on liability under EU competition law may still underpin follow-on claims where the decision was reached before the end of the transition period.

For these claims, the claimant can rely on the infringement decision and the action only assesses the quantum of damage suffered. In standalone cases, the claimant has to prove the breach of competition law before going on to the issue of damages. Both types of claim can be heard in either the High Court (or the Court of Session in Scotland) or the CAT.

The UK Regulations (SI 2017/385) that implemented the EU Damages Directive (Directive 2014/104/EU) came into force on 9 March 2017. The Regulations apply to claims relating to cartels arising on or after 9 March 2017, although some aspects of the Regulations apply to claims where the cartel existed before that date. The Directive seeks to facilitate competition law damages claims across the EU. In its consultation documents, the UK government stated that it considered that the UK rules were largely in line with the requirements of the Directive and therefore significant changes to UK legislation were not required. This was the case in particular following the reforms introduced by the Consumer Rights Act 2015. Nonetheless, the implementation of the Directive amended the Competition Act 1998, the Civil Procedure Rules and the CAT Rules in some significant respects.

The future development of private damages claims is unclear following Brexit. However, divergence seems unlikely, at least in the short term.

Law stated - 24 October 2022

Competition guidelines

Have the competition authorities, or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

No. The CMA has not issued any specific guidance on the overlap of competition law and IP. However, the CMA will have regard to guidelines developed by the Commission to the extent that such guidance remains relevant to the retained block exemptions. For example, the Technology Transfer Guidelines (OJ 2014 C 89/03) set out the Commission's approach to assessing the competitive effects of technology transfer agreements.

Law stated - 24 October 2022

Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

No. In UK competition law there are no uses of IPRs that are specifically exempt from the application of competition law. However, a number of retained EU block exemptions make specific reference to IPRs (see, for example, the Technology Transfer Guidelines (OJ 2014 C 89/03)). Agreements covered by a block exemption will be exempt from the application of the Chapter I provisions. There are no IPR-specific exemptions from the Chapter II provisions.

Law stated - 24 October 2022

Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws?

The doctrine of copyright exhaustion is contained in national legislation. Sections 16(1)(b), 18(1) and 18(2) of the Copyright, Designs and Patents Act 1988 establish the copyright holder's exclusive right to issue (ie, distribute) copies of their work to the public. Section 18(3)(a) contains the principle of exhaustion, stating that the subsequent distribution of copies of a work will not infringe the copyright holder's distribution right.

The UK government has implemented the Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019 (as further amended by the Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1050)) in relation to the position on exhaustion of rights in the UK post-Brexit. This means there is now asymmetric regional exhaustion in the UK. While the UK will continue to recognise European Economic Area (EEA) exhaustion (which means that UK IP owners will not be able to prevent parallel imports from the EEA), goods cannot be freely imported from the UK to the EEA. As a result, UK businesses must check if they need to obtain EEA-based IP owner's permission before they export goods from the UK to the EEA.

Law stated - 24 October 2022

Import control

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

The position of import control in respect of goods flowing from the EEA into the UK is unchanged post-Brexit. The doctrine of copyright exhaustion is contained in national legislation and EU retained law. Subject to the doctrine of implied licence, if a UK IPR holder markets its products outside the EEA, it can control the unauthorised import of those products into the EEA.

Law stated - 24 October 2022

Jurisdictional interaction between competition laws and IP rights

Are there authorities with exclusive jurisdiction over IP-related or competition-related matters? For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

The UK competition authority is the CMA. It is the body that reviews and enforces competition law complaints and investigations.

The CAT has jurisdiction to hear follow-on and standalone actions and to undertake fast-track actions for simple claims involving small and medium-sized enterprises. The High Court (and the Court of Session in Scotland) also has jurisdiction to hear competition cases.

IP proceedings in the English High Court are heard in the Chancery Division.

CPR, rule 30.8 provides that claims dealing with Chapter I or II of the Competition Act will be transferred to the Chancery Division.

Law stated - 24 October 2022

MERGER REVIEW

Powers of competition authority

Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes, the Competition and Markets Authority (CMA) has the same authority with respect to reviewing mergers involving IP rights (IPRs) as it does with any other merger. The acquisition or sale of IPRs alone will only amount to a relevant merger situation if it constitutes the acquisition or sale of a business. For this to be the case, the IPRs must constitute a business with a market presence to which a market turnover can be clearly attributed.

Law stated - 24 October 2022

Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The UK competition authorities apply the same general competition law principles to mergers involving IPRs that they apply to mergers involving any other form of property. Under the Enterprise Act, the substantive assessment is whether or not the merger will result in a substantial lessening of competition.

The existence of IPRs can play a part in defining the relevant market in which goods or services are sold and, as a

result, what market the competitive effects of the merger need to be assessed in respect of. For example, in a situation where a manufacturer holds significant IPRs that allow it to prevent other manufacturers from producing spare parts for its products, the substitutability of the other manufacturers' products could be reduced. This could result in a narrow definition of the relevant market for those spare parts. The strength of IPRs held by incumbent market participants may also be considered a barrier to entry into a market. Similarly, where parties hold complementary IPRs or IPRs for alternative technologies a merger could give rise to significant issues. Where licences are held, particularly in the medium or short term, more complex issues can arise on whether the IPRs are to be ascribed to the licensee or the licensor.

Law stated - 24 October 2022

Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

The UK competition authorities apply the same analysis to transactions involving the transfer of IPRs as they would apply to a transaction involving any other property. IPRs can be relevant in identifying barriers to entry and definition of relevant market.

Law stated - 24 October 2022

Remedies to address the competitive effects of mergers involving IP

What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

The main remedy applied to address the competitive effects of mergers involving IPRs is divestiture, either by licensing or assignment. The aim is that the parties acquiring the IPRs should be able to compete effectively with the merged entity.

The CMA has published guidance on merger remedies (CMA87), which contains guidance on IPR remedies. According to the guidance, for licensing of IPRs to be effective as a remedy it must be sufficient to significantly enhance the acquirer's ability to compete with the merged entity. Such a remedy may not be effective if it needs to be accompanied by other resources (such as sales networks) to enable effective competition and these are unlikely to be available to the acquirers of the IPRs. Where the terms of an IPR remedy result in a material ongoing link between the merger parties and the parties gaining the IPR (eg, providing access to new releases or upgrades of technology or data), the measure may take on some of the characteristics of a behavioural commitment, which requires ongoing monitoring and enforcement.

Given these difficulties in crafting effective IPR-based remedies, where possible, the UK competition authorities generally prefer to divest a business including IPRs rather than relying on IPR remedies alone. The view is that the business including the IPRs is more likely to include all that the acquirer needs to compete effectively with the merged entity.

Law stated - 24 October 2022

SPECIFIC COMPETITION LAW VIOLATIONS

Conspiracy

Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

The Chapter I provisions do not generally prevent IP rights (IPRs) from being enforced, licensed or transferred. However, these are treated in the same way as non-IPR conduct. That is, agreements that have as their object or effect the restriction, prevention or distortion of competition in the UK will breach the Chapter I provisions. IPR-related agreements that fix prices, limit or control production or supply, or involve market sharing or allocation are likely to be considered infringements. This means that the way an IPR is used can become subject to competition law enforcement (for example, the reverse payment settlement cases).

Under the Enterprise Act, it is a criminal offence for an individual to agree with one or more other persons to make or implement (or cause to be implemented) arrangements relating to at least two undertakings involving the following prohibited cartel activities: price-fixing, market sharing, limitation of production or supply and bid rigging. A person who is guilty of the cartel offence is liable for up to five years' imprisonment or an unlimited fine.

IPR pools, where two or more parties assemble a package of protected works either for their own use or for licensing to third parties, can raise competition law liability. Such pools can create efficiencies for both the right holders and the right purchasers. However, they may limit third-party access to the pools or foreclose opportunities for rivals who are not part of the pool. This has not yet been examined in the UK, but the Technology Transfer Block Exemption Regulation (TTBER) Guidelines (OJ C 89, 28 March 2014, pp 3-50) contain a framework for assessing the application of EU competition law to the pooling of protected works.

Law stated - 24 October 2022

Scrutiny of settlement agreements

How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

In the same way as any other agreement, a settlement agreement terminating an IPR infringement dispute must comply with UK competition law. The TTBER Guidelines deal with this directly. They address the licensing of technology rights in settlement agreements as a means of settling disputes or avoiding a situation in which one party exercises its IPRs to prevent the other party from exploiting its own technology rights. These agreements can breach competition law where the settlement leads to a delayed or otherwise limited ability of the licensee to launch the product on any of the markets concerned. If the parties to such an agreement were competitors and there was a significant value transfer from the licensor to the licensee, there may be a risk of it constituting market allocation or market sharing. Cross-licensing in settlement agreements may also be anticompetitive where the parties have a significant degree of market power and the agreement imposes restrictions that clearly go beyond what was required. Additionally, non-challenge clauses in settlement agreements may breach competition law where an IPR was granted following the provision of incorrect or misleading information.

Agreements that could be problematic from a competition perspective include patent settlements that may lead to a delay of generic entry in return for a value transfer from the originator company to the generic company. Settlement agreements in which the regulator considered the patent holder to have known that the patent did not meet the patentability criteria have also been scrutinised from a competition law perspective. In particular, regulators have shown interest where the patent was granted following the provision of incorrect, misleading or incomplete information.

Reverse payment patent settlements

How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

In February 2016, the Competition and Markets Authority (CMA) fined GlaxoSmithKline (GSK) and a number of generic companies £45 million in respect of certain patent settlement agreements related to the antidepressant paroxetine (branded Seroxat by GSK). In the same investigation, the CMA issued a 'No Grounds for Action' decision in respect of IVAX Pharmaceuticals UK's agreement with GSK. The fined parties appealed the CMA's decision to the Competition Appeal Tribunal (CAT), which, on 8 March 2018, referred a number of questions to the Court of Justice of the European Union (CJEU). On 30 January 2020, the CJEU issued its decision in the preliminary ruling referral. This was hot on the heels of Advocate General Kokott's opinion the week before. The Court's decision is notable for its depth and breadth. It found, broadly agreeing with AG Kokott, that an agreement to settle a patent dispute may constitute a restriction of competition by object or by effect and that entering into such an agreement may be an abuse of a dominant position. On 10 May 2021, the CAT dismissed the companies' remaining grounds of appeal (but reduced the imposed fines to £27.1 million).

In September 2016, the General Court of the European Union (General Court) delivered its judgment in Lundbeck (Case T-472/13). The court dismissed the appeal against the Commission's decision and found that, in specific circumstances, reverse payment patent settlements could amount to a restriction of competition by object. The General Court's decision was appealed to the CJEU. Lundbeck, a Danish pharmaceutical company, appeared at the EU court along with several generic manufacturers for an oral hearing in January 2019. On 4 June 2020, Advocate General Kokott delivered her opinion concluding that the General Court's judgment should be upheld. In March 2021, the European Court of Justice (ECJ) dismissed Lundbeck and the generic manufacturers' appeals against the General Court's judgment.

Notwithstanding the UK's exit from the EU, this case may still be influential as to the application of competition law in the UK to reverse payment patent settlements.

In December 2018, the General Court partially overturned the EU Commission's decisions in *Perindopril (Servier v Commission and Krka v Commission)*, confirming that a patent settlement agreement can be a restriction by object. The General Court somewhat narrowed the EU Commission's expansive reading of what constitutes a value transfer in the context of a patent settlement and also expressly permits settlements that are not pan-EU but that have different outcomes in different parts of the EU. This decision was appealed by both the EU Commission and Servier. On 14 July 2022, Advocate General Kokott delivered her opinion that the General Court was incorrect to hold that the agreements concluded by Servier and Krka did not constitute a restriction of competition by object and effect.

In November 2020, the European Commission fined Teva and Cephalon €60.5 million for agreeing to delay the market entry of generic modafinil.

These cases make it clear that reverse payment patent settlement agreements are still very much in the crosshairs.

(Resale) price maintenance

Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

IPR licences are treated in the same way as other agreements in this context. A licence that imposes (directly or

indirectly) a minimum resale price for goods or services will likely infringe the Chapter I provisions. Price-fixing and resale price maintenance agreements are seen as hardcore restrictions and are also excluded from the block exemptions. For example, the block exemptions will not apply to price fixing.

In September 2020, the CMA published an addendum to its leniency guidelines in resale price maintenance (RPM) cases. Companies that apply for 'Type B' leniency on or after 24 September 2020 will only receive a 50 per cent penalty discount in RPM cases. Type B leniency applies to the first applicant to report and provide evidence of a cartel when the CMA is conducting a pre-existing investigation into the reported cartel conduct.

Law stated - 24 October 2022

Exclusive dealing, tying and leveraging

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?

The Chapter I and Chapter II provisions do not generally prevent IPRs from being enforced, licensed or transferred. However, these are treated in the same way as non-IPR conduct and should be assessed on a case-by-case basis. IPR-related agreements dealing with exclusive dealing can infringe the Chapter I provisions. For example, an IPR-related exclusive dealing arrangement that prevents a manufacturer from distributing outside a certain territory may be seen as a form of market sharing. Additionally, a dominant company could infringe the Chapter II provisions by only granting a licence to a licensee who agrees to buy unrelated products or services.

Law stated - 24 October 2022

Abuse of dominance

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

Even a dominant company has the right to choose its trading partners and dispose of its IPRs freely. However, certain IPR-related conduct can be seen as abusive and contrary to the Chapter II provisions. Such conduct can include abusive defence of patent litigation, acquisition of competing technology, discriminatory licensing practices, refusal to license (in exceptional circumstances) and the charging of unfair prices for goods or services protected by IPRs. In October 2017, the CMA announced that it had launched four separate antitrust investigations into alleged anticompetitive practices regarding generic products in the pharmaceutical industry. Three of the cases were being examined for potential abuse of dominance (alongside alleged horizontal practices). In one of these cases (MSD/Remicade), the CMA issued a final decision in March 2019, deciding that, following the statement of objections, there were no grounds for action (ie, the case was closed without an infringement finding). One important point arising from this decision is that the CMA rejected the submission that the as-efficient competitor test (AEC price/cost test) would have prevented the CMA from finding foreclosure as established.

Over the past few years, a number of authorities (particularly the CMA) have started or completed investigations into excessive pricing of pharmaceuticals. One of the common features is that they involve products that at one stage were patent-protected. After patent expiry, the company, often following a sale of the product, changed the status from branded to generic and then increased the price by many multiples beyond the historic price. In finding that the prices were unfair, the authorities have typically relied (among other things) on the fact that the drugs had long been off-patent. The CMA originally fined Pfizer and Flynn £89.4 million in 2016. In June 2018, the CAT held that the CMA had misapplied the relevant legal test. On appeal, the Court of Appeal in March 2020 re-affirmed the CAT's decision that the question of abuse and penalties be remitted to the CMA but it upheld the CMA's ground of appeal that the CAT had

erred by requiring the CMA to identify a hypothetical benchmark price in assessing whether prices were excessive. This highlights the challenges faced by regulators when bringing these cases. In July 2022, the CMA fined Pfizer and Flynn almost £70 million in response to the Court of Appeal's judgment.

In light of the Court of Appeal's decision, the CMA issued supplementary statements of objections for two ongoing investigations under article 102/Chapter II into liothyronine and hydrocortisone relating to excessive and unfair pricing. The CMA fined Advanz and its former owners, HgCapital and Cinven, £101.44 million for charging excessive prices for liothyronine and fined Auden McKenzie, Actavis and others over £260 million for charging excessive prices for hydrocortisone. The CAT is hearing the appeals against the CMA's decisions in Autumn 2022.

The strength of IPRs may also be considered a barrier to entry into a market, leading to a narrower market definition and, as a result, could make it more likely that the holder of the IPRs could be considered to be in a dominant position.

Law stated - 24 October 2022

Refusal to deal and essential facilities

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

The refusal to grant a licence (ie, a refusal to deal) may constitute an abuse of dominance in exceptional circumstances. For now, the UK position still largely mirrors that of EU competition law.

In 2013, the Court of Appeal dismissed an appeal by Chemistree Homecare Limited against the High Court's refusal to grant it an interim injunction in a case concerning an alleged refusal to supply a patented medical product (Chemistree Homecare Ltd v Abbvie Ltd [2013] EWCA Civ 1338). The Court held that Chemistree did not have a real prospect of showing that Abbvie had a dominant market position. It had not provided sufficient evidence to establish that the relevant product market comprised only Abbvie's product.

In July 2015 the ECJ in Huawei Technologies Co Ltd v ZTE Corp, ZTE Deutschland GmbH laid out criteria for when a standard-essential patent (SEP) holder is entitled to seek an injunction against a potential licensee (without violating antitrust laws). On 26 August 2020, the Supreme Court provided further interpretations of this decision and ruled in Unwired Planet International Ltd. v Huawei Technologies (UK) Co Ltd and Huawei Technologies Co Ltd v Conversant Wireless Licensing SARL that so long as the SEP holder is a willing licensor on fair, reasonable and non-discriminatory (FRAND) terms, the holder may seek an injunction without abusing its dominance. The 'non-discriminatory' prong of the FRAND offer need not be a single 'most favoured' rate for all licensees. In addition, the court held that English courts have the power to enjoin an SEP implementer (unless it enters into a global FRAND licence of a portfolio that includes foreign patents) and to determine royalty rates and terms of such a licence.

Law stated - 24 October 2022

REMEDIES

Remedies for violations of competition law involving IP

What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

The remedies for violations of competition law involving IP rights are the same as those for breaches of competition law generally.

The Competition and Markets Authority (CMA) can accept binding commitments offered by the parties to address infringements of the Chapter I and II provisions. It also has the power to impose financial penalties of up to 10 per cent

of the worldwide turnover of an undertaking for such infringements. Additionally, it can give such directions as it considers appropriate to bring the infringement to an end. The CMA has a wide discretion in this respect, but can include directions to cease certain behaviour or to set up systems to prevent continuance of the infringements.

The CMA can also impose interim measures where it has a reasonable suspicion that there has been an infringement and the measures are necessary to protect the public interest or to prevent significant damage to particular persons or businesses. In such cases, it can give any directions that it considers appropriate to prevent the harm feared. There is no requirement that the directions be ones it could give in a final order, nor that the measures be temporary and conservatory.

The courts (including the Competition Appeal Tribunal) can grant injunctions and award damages. The infringing party can also face criminal liability.

Law stated - 24 October 2022

Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

No.

Law stated - 24 October 2022

ECONOMICS AND APPLICATION OF COMPETITION LAW

Economics

What role has competition economics played in the application of competition law in cases involving IP rights?

Regardless of whether IP rights are involved, economics plays an important role in competition law cases. Economic analysis is relevant at the stage of assessing the anticompetitive effects of behaviours and conduct, but it is also important in determining the relevant markets for goods and services.

Law stated - 24 October 2022

RECENT CASES AND SANCTIONS

Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In February 2016, the Competition and Markets Authority (CMA) (in a case started by its predecessor, the Office of Fair Trading (OFT)) fined GlaxoSmithKline (GSK) and two other pharmaceutical companies (the generic companies) in relation to anticompetitive patent settlement agreements. The CMA found that the generic companies agreed to delay the launch of their generic versions of the drug paroxetine in return for substantial payments by GSK. The CMA also found that GSK abused its dominant position in the UK market by seeking to delay the generic companies' entry into the market. The OFT had previously alleged that a third generic pharmaceutical company had entered into an anticompetitive agreement with GSK. However, the CMA issued a no grounds for action decision in respect of that agreement. The CMA's decision was appealed to the Competition Appeal Tribunal (CAT), which, on 8 March 2018, referred a number of questions to the Court of Justice of the European Union (CJEU). The CJEU delivered its judgment

in January 2020, clarifying the criteria applicable to settlement agreements between holders of pharmaceutical patents and generic manufacturers. On 10 May 2021, the CAT dismissed the companies' remaining grounds of appeal (but reduced the imposed fines to £27.1 million).

The CMA has recently closed and opened a number of investigations into excessive pricing of pharmaceuticals. The CMA fined Advanz and its former owners, HgCapital and Cinven, £101.44 million for charging excessive prices for liothyronine and fined Auden McKenzie, Actavis and others over £260 million for charging excessive prices for hydrocortisone. The CAT is hearing the implicated companies' appeals against the CMA's decisions in Autumn 2022.

The English High Court has recently decided several cases relating to the enforcement of standard-essential patents and fair, reasonable and non-discriminatory (FRAND) licensing obligations.

Law stated - 24 October 2022

Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

In 2010, the OFT fined Reckitt Benckiser £10.2 million (reduced from £12 million as part of an early resolution agreement) for the abuse of its dominant position on the market for the NHS supply of certain medicines. The claim related to product evergreening.

In 2016, the CMA fined GSK and two other generic pharmaceutical companies a total of £45 million for agreeing to delay entry of generic versions of paroxetine, for which GSK held certain patents in the UK. The CMA's decision was appealed to the CAT which, on 8 March 2018, referred a number of questions to the CJEU. On 10 May 2021, the CAT dismissed the companies' remaining grounds of appeal (but reduced the imposed fines to £27.1 million).

In August 2019, the CMA provisionally accepted a £10.1 million settlement from Aspen over an agreement that prevented the entry of a competing version of the drug fludrocortisone. Unusually, Aspen agreed to pay its customer, the NHS, £8 million without the government launching court proceedings. Aspen also paid a fine of £2.1 million.

The CMA fined Advanz and its former owners, HgCapital and Cinven, £101.44 million for charging excessive prices for liothyronine and fined Auden McKenzie, Actavis and others over £260 million for charging excessive prices for hydrocortisone.

Law stated - 24 October 2022

UPDATE AND TRENDS

Key developments

Are there any emerging trends or hot topics in the law of IP and antitrust policy? Have changes occurred recently or are changes expected in the near future that will have an impact on the application of competition law to IP rights?

UK competition law has undergone significant changes following the UK's exit from the EU. Following the end of the transition period (that is, from 1 January 2021 onwards), the Competition (Amendment etc.) (EU Exit) Regulations 2019 mean that EU competition law no longer has effect in the UK; the Regulations revoked articles 101 and 102 of the Treaty on the Functioning of the European Union and the EU Merger Regulation.

The Competition and Markets Authority (CMA) and the European Commission no longer have concurrent jurisdiction to enforce competition law in the UK. The CMA has also gained a new role under the Internal Market Act 2020, with a new Office for the Internal Market (OIM) having been established within the CMA. The OIM will support the functioning of

the UK internal market.









However, section 60A of the Competition Act provides that UK competition authorities and courts are obliged to ensure that there is no inconsistency between UK law and practice and pre-exit EU competition case law, other than in specific circumstances. In addition, with the exception of the new EU Vertical Restraints Block Exemption, the existing EU block exemptions have been copied into UK law as retained exemptions to the Chapter I prohibition. For vertical agreements, the UK has introduced the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (SI 2022/516), which took effect on 1 June 2022 following the expiry of old EU Vertical Block Exemption Regulation.

Brexit also had a significant impact on IP rights (IPRs) in the UK created by EU instruments; namely, EU trade marks, registered Community designs, unregistered Community designs, database rights, Community plant variety rights and geographical indications. National IPRs have remained largely unaffected. The EU Withdrawal Agreement provided for holders of EU-created IPRs to be granted equivalent UK rights immediately after the Brexit completion day (31 December 2020).

Although it does not strictly relate to competition law, the recent National Security and Investment Act 2021 (NSIA) is a major piece of merger control legislation. It came into effect on 4 January 2022 and replaces the previous national security provisions in the Enterprise Act 2002. The NSIA provides for national security review of transactions involving the acquisitions of undertakings engaged in sensitive sectors of the UK economy. Unlike the voluntary merger notification system that operates for regular merger control, the NSIA operates both a voluntary and mandatory regime. A number of cases have been blocked under the NSIA jurisdiction, including a proposed licensing agreement that involved the transfer of IPRs in vision-sensing technologies from the University of Manchester to the Chinese firm BIVT, seemingly on the basis that the technology had military application and that, therefore, the licensing agreement posed a national security risk to the UK.

Law stated - 24 October 2022

Jurisdictions

	China	FenXun Partners
	Germany	Meissner Bolte
	India	Chadha & Chadha Intellectual Property Law Firm
	Indonesia	SSEK Legal Consultants
	Japan	Anderson Mōri & Tomotsune
	Kazakhstan	Baker McKenzie
	Mexico	Calderón & De La Sierra
	Portugal	PLMJ
	Turkey	ACTECON
	United Kingdom	Arnold & Porter