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**Questionnaire for question A**

**Is the concept of the abuse of relative market power beyond market dominance necessary to ensure a functioning competition and what criteria should be used to assess it?**

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# Background and context

The term ‘relative market power’, also known in other jurisdictions as ‘economic dependence’, superior or unbalanced bargaining power’ or ‘significant imbalance in commercial relations’, is used to describe circumstances in which a company exploits its superior bargaining position vis-à-vis business partners. These rules exist all over the world, from Europe to South Korea or Brazil. In contrast to the traditional concept of dominance, the concept of relative market power is concerned with the analysis of asymmetric dependencies or bargaining positions in businessto-business (B2B) relationships, irrespective of a dominant market position or monopoly power in the traditional sense. This is relevant to business-to-business relationships, including distribution, franchising, subcontracting, supply chains and others, in both traditional and digital markets.

This additional tool for regulating unilateral conduct has recently received renewed attention, reflecting a broader trend in the regulation of business-to-business (B2B) relationships. In recent years, several jurisdictions in Europe, including France, Belgium, Switzerland and Austria, have introduced or updated legislation targeting the abuse of economic dependence or relative market power. The proliferation of these legislative measures highlights the need for transparent, predictable and enforceable criteria for assessing relative market power, situations of dependence and imbalances in bargaining power in the B2B context. It also raises the question of the extent to which such provisions serve to maintain effective competition and thus form part of competition, anti-monopoly or antitrust law as it is commonly understood. This study aims to examine how these criteria are applied in practice, the challenges of enforcement and the wider implications of this regulatory trend for competition policy and the economy.

The following list of questions should be understood as a reminder of issues that may rise in the relevant jurisdiction. National rapporteurs are free to structure the report as they wish, covering only issues relevant to their jurisdiction or discussing other issues arising in their jurisdiction that are not mentioned in this questionnaire.

# Introduction: Origin and Development of the Rules in your Jurisdiction

This response will address relative market power and economic dependence through the lens of (i) general English contract law doctrines and (ii) UK sector-specific legislation.

Does your jurisdiction have rules or case-law dealing in one way or another with relative market power or economic dependence?

Yes. There is express treatment in both contract law and in competition law, as outlined further below.

What is the nature of the rules: are they part of competition law or other specific laws or general contract law? Where is there discussion or debate about how best to deal with such concerns?

There is significant discussion of the boundaries of relative market power doctrines relative to both contract law, and competition law.

1. **Contract law**
2. ***The rejection of a general doctrine of inequality***

A distinguishing feature of English law is its at least apparent total rejection of any cross-cutting concept of inequality of bargaining power or economic dependence.

There is an unusually forceful position rejecting relative position analysis from the senior judge Lord Scarman in *National Westminster Bank v Morgan* [1985] UKHL 2.[[1]](#footnote-2)

“And even in the field of contract I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power. Parliament has undertaken the task - and it is essentially a legislative task - of enacting such restrictions upon freedom of contract as are in its judgment necessary to relieve against the mischief: for example, the hire-purchase and consumer protection legislation, of which the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974, Consumer Safety Act 1978, Supply of Goods and Services Act 1982 and Insurance Companies Act 1982 are examples. I doubt whether the courts should assume the burden of formulating further restrictions.

This crucial development pointed English law firmly away from an earlier attempt to create a cross-cutting doctrine of relative inequality in contractual settings. This superseded the attempt to do so by the relatively more activist, but less senior, Lord Denning in *Lloyds Bank v Bundy* [1974] EWCA 8:

“Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal’.

It was this view which Lord Scarman so pointedly rejected in *Morgan*. Therefore, it falls to specific instances of contract law doctrines to consider relative position, rather than any cross-cutting principle.

The point was prominently summarised in the leading duress case, *Pakistan International Airlines Corp v Times Travel (UK) Ltd* [2021] UKSC 40, which is discussed further below. There, Lord Hodge said:

26. It is not in dispute that there is in English common law no doctrine of inequality of bargaining power in contract, although such inequality may be a relevant feature in some cases of undue influence … In negotiating a commercial contract each party to the negotiations seeks to obtain contractual entitlements which he or she does not possess unless and until the parties agree the terms of the contract. Inequality of bargaining power means that one party in the negotiation of a commercial contract may be able to impose terms on a weaker party which a party of equal bargaining power would refuse to countenance.

Significantly, the same paragraph goes on specifically to reject any general duty to deal even in ***monopoly*** cases, let alone those of relative imbalance:

… Equally, a party in a strong bargaining position, such as a monopoly supplier, may refuse outright to enter into a contract which the weaker party desires or may impose terms which the weaker party considers to be harsh. The courts have taken the position that it is for Parliament and not the judiciary to regulate inequality of bargaining power where a person is trading in a manner which is not otherwise contrary to law.

Therefore, any such rules arise from sector specific law and particular doctrines or statutory empowerments reading on instances of relative position, rather than any general doctrine.

Justifications for this rejection of any cross-cutting inequality doctrine include that:

1. Specific doctrines comport better to particular instances of concern, thereby avoiding undue vagueness. That is, there is no upside to the breadth of a cross-cutting doctrine compared with the application of more specific tools, while there are downsides.
2. The doctrine is overly broad. All contracts have some sort of unequal relationship, so any cross-cutting inequality doctrine would engage many instances of contracts which ought to stand.
3. Legislative intervention is the better pathway for fairness control.

These points are all, of course, debatable. In particular, the final point on fairness control via legislative means may well understate the difficulty and complexity of passing legislation.

For instance, it took several years for the major recent example of relative market power control in sector-specific legislation, the UK Digital Markets, Competition and Consumers Act (hereafter, DMCCA). Whether this was wise caution or undue delay of depends upon perspective.

In any event, no cross-cutting legislation on relative market power or dependence has been passed such that where general contract law applies, the above position pertains: there is no specific doctrine of relative market power or economic dependence.

1. ***Specific contract law instances in which relative market power and economic dependency come into play***

The major pathways by which relative market power and economic dependency come into play in English contract law are the doctrines of duress and undue influence. Relatedly, there are debates in the evaluation of consideration (loosely, the contractual price) which, by rejecting tests on relative party position, similarly constrain analysis.

1. **Duress doctrines**

Starting with *free-standing duress defences*, it has long been a principle of English contract law that a truly overborne will can invalidate contractual modification. However, there are thorny debates about the relevant evidence gates reflecting the difficulties of distinguishing normal commercial pressures from true cases of an overborne will.

The starting point for duress for many years was the test articulated by – once again – Lord Scarman in *Pao On v Lau Yiu Long* [1979] UKPC 17. This asked whether:

* Protestation occurred;
* Alternatives were available;
* Advice was taken;
* Avoidance was sought after the contract.

The test would be later developed, again by Lord Scarman, in *Universe Tankships Inc. of Monrovia v International Transport Workers' Federation* [1982] 2 All ER 67.

It is debatable whether the apt acronym (PAAA for rejection of an obligation) was intended. In any event the tests are themselves rather debatable. For instance:

* Protestations are pointless where market power is strongest;
* Alternatives are not necessarily constraints on market power;
* The presence of absence of advice is easily gamed by professional advisors;
* As with protestations, avoidance is not likely to be a strong proxy for exploitative activity.

These issues led to certain recurrent difficulties in the use of duress doctrines. Ultimately, they should distinguish exploitative contracting from merely improvident transactions. Perhaps the most prominent and recurrent issue lay in whether a lawful action could amount to duress.

This is an interesting debate because it pits freedom of contract against the possibility that improvident bargains might be agreed. A strict freedom of contract view would note that if there is an agreement, then that is an obligation provided that it is *volens*. It follows that if there is to be contractual freedom, then there is no role for contextual control of a voluntary act provided that agreement took place.

A prominent example in the Court of Appeal was *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] EWCA Civ 19, which held (albeit in obiter dictum) that a lawful act could amount to duress, that is, rejecting a pure freedom of contract analysis.

The point seems to have been definitively determined in the important Supreme Court *Pakistan International Airlines* case, noted above. This restated duress doctrines consistently with the Lord Scarman “PAAA” test, but with greater emphasis on whether alternative courses of action are reasonable.

The case facts repay close analysis. Times Travel had built a business selling tickets for the airline, PIA, which formed most of the agent’s business. Moreover, PIA was the only airline flying direct to Pakistan from the UK. Thus, relational market power might well have been present. Further, exploitative conduct was arguably present in that PIA insisted on the abrogation of accrued commissions at a re-contracting point.

Nonetheless, the Supreme Court declined to find duress in PIA’s threats to terminate TT’s agency unless the debts were waived. The Court emphasised the need to prove bad conduct in addition to a mere demand to waive the past commissions, and further noted a need to show a causal link between pressure exerted and an improper motive. By contrast, the dispute was characterised as commercial in nature.

From an economic perspective, this critical juncture amounts to a rejection of relative market power analysis essentially on the basis that it would interfere in vertical integration. For example, it was always open to Times Travel to gain a longer contract or indeed for PIA to sell its own tickets direct, or via other intermediaries.

Thus, the same false positive risk from duties to deal familiar to competition lawyers arises: **by intervening in a distribution dispute, the law would invite inadvertent protection of inefficient distributors.** That is, what looks to a distributor like not being paid might in fact be a material dispute about efficacy. After all, few businesses happy with service refuse to pay for it because they will not be served again.

Followed to its logical conclusion, that false positive concern would suggest that relative power is not usually a basis for intervention, because in the absence of *absolute* market power there would be alternatives; and the market may well have an important reason to favour them, however harsh this may be in particular instances such as for the ticket distributor, Times Travel.

Considering the primarily civilian audience of this report, it may be of interest to know that this strong rejection of any duty to deal on the basis of relative market power is also based on an **express rejection of good faith.** The pivotal *PIA* case comments:

27… in contrast to many civil law jurisdictions and some common law jurisdictions, English law has never recognised a general principle of good faith in contracting. Instead, English law has relied on piecemeal solutions in response to demonstrated problems of unfairness…

28. The absence of these doctrines restricts the scope for lawful act economic duress in commercial life.

The Court further referred to Professor Jack Beatson’s influential work *The Use and Abuse of Unjust Enrichment* (OUP, 1991), which provided a classic “common law” justification for the absence of a cross-cutting good faith doctrine: that the meaning of liberty is the absence of an obligation to justify conduct. As the *PIA* court cited with approval:

All that is not prohibited is permitted and there is no general doctrine of abuse of rights. **If therefore a person is permitted to do something, he will generally be allowed to do it for any reason or for none.** In the context of contractual negotiations this position enables people to know where they stand and provides certainty as to what is acceptable conduct in the bargaining process but it does leave many forms of socially objectionable conduct unchecked. **Again, this is soundly based for judges should not, as a general rule, be the arbiters of what is socially unacceptable and attach legal consequences to such conduct.**

Beatson, *The Use and Abuse of Unjust Enrichment*, pp.129-30 (emphasis added)

Therefore, the strong rejection by general English contract law of any doctrine of party inequality comports with a wider individualistic focus, also apparent in the rejection of any but the narrowest mistake doctrine (*Bell v Lever Brothers* [1932] AC 161) and the narrow construction of the frustration of obligations (J*. Lauritzen A.S. v Wijsmuller B.V*, [1990] 1 Lloyd's Rep 1 (“*The Super Servant Two*”). In summary, if an obligation is agreed, it will normally stand regardless of relative party position, chiefly on the basis that parties are taken to agree to manage their own risk factors.

*Relationship to consideration doctrines*

There is an adjacent debate on revisions to contract which should be noted in addition to free-standing duress doctrines. Sometimes, relative market power arises in purported re-contracting. This means that doctrines managing modification are relevant to the question of relative market power control.

As a starting point, it is interesting to note the distinctive role of consideration in common law jurisdictions. For an informal contract to arise, that is, one without a formal written deed, there must be an exchange of value. This may originally reflect historic requirements for substantive equality of exchange, perhaps derived from Thomas Acquinas’ observations that:

“If someone would be greatly helped by something belonging to someone else, and the seller not similarly harmed by losing it, the seller must not sell for a higher price: **because the usefulness that goes to the buyer comes not from the seller, but from the buyer's needy condition**: no one ought to sell something that doesn't belong to him.

...there is no reason why gain [from trading] may not be directed to some necessary or even honourable end; and so trading will be rendered lawful; as when a man uses **moderate gains** acquired in trade for the support of his household, or even to help the needy...

Aquinas *Summa Theologiae*, 2-2, q. 77, art. 1 (emphasis added)

The essential idea from Acquinas is that value ought not to derive from the exploitation of relative position. The role of contract law as a potential mechanism to control inefficient overpricing is underexplored as was identified in D D Friedman, “In defense of Thomas Acquinas and the just price,” 12(2) *History of Political Economy* (1980).

Friedman’s underappreciated hypothesis is exactly that relative party position was controlled by the just price doctrine derived from Acquinas. As Friedman noted:

Consider a bilateral monopoly. I own the only horse in the village; you are the only one in the village who wants to buy a horse. I value the horse at 10 pennies, you at 20. Conventional economic analysis says only that we will agree on some price between 10 and 20. But suppose further that each of us can influence the price by various costly means. For instance, I can overstate the value of the horse to me, you can understate its value to you. The cost here is the risk that if both of us misstates our value too much – if I persuade you that the horse is worth 21 pence to me, and you persuade me that it is worth 9 to you – I may sell you a line but fail to sell you a horse. Alternatively, you may try to prove that the horse is not worth much to you by making a low offer and trying to wait me out – while your crops rot in the field. This is a common situation in union-management bargaining, a familiar example of bilateral monopoly.

While there is no satisfactory theory to tell us how much of the 10-penny profit will be eaten up by bargaining costs, much of it may be. If so, it might be in our joint interest to accept some less costly way of deciding on a price.

Friedman (1980)

It is striking that relative market power, if present, correlates with exactly this type of rent-seeking activity, and not production. Friedman’s thesis is that average costs decrease with a meaningful relative market power doctrine, provided that its scope is apt.

However, modern English law came to reject this viewpoint, implicitly because of the inherent evaluative difficulties in comparing “usefulness” and “moderate gains,” in Acquinas’ terminology, especially in a complex industrial economy straining the underlying assumption from Acquinas that reasonable need could be read from context.

The most prominent contract case is *Chappel v Nestlé* [1959] UKHL 1. There, the House of Lords found value even in chocolate bar wrappers due for discard, considering their collection in a marketing promotion by which what was essentially rubbish could be traded for a vinyl record. While the facts are dated, the case contains the classic statement that a so-called peppercorn interest still counts as the valid basis for a bilateral contract:

“A contracting party can stipulate for what consideration he chooses. **A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn**.”

*Chappel v Nestlé* at 114 (Lord Somervell)

Under Lord Somervell’s elegant formulation, there is to be no determination of position relative to value: that is entirely for the parties.

It is interesting to note that the same result has obtained in the United States: *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App. 1949). In this very famous case, Demotsis had written a letter confirming a debt of $2,000 to Batsakis. In fact, Demotsis received 500,000 drahmae, valued at just $25.

The case arose from striking economic inequality, as can be seen in the letter itself:

Peiraeus April 2, 1942

Mr. George Batsakis

Konstantinou Diadohou #7

Peiraeus

Mr. Batsakis:

I state by my present (letter) that I received today from you the amount of two thousand dollars ($2,000.00) of United States of America money, which I borrowed from you for the support of my family during these difficult days and because it is impossible for me to transfer dollars of my own from America.

The above amount I accept with the expressed promise that I will return to you again in American dollars either at the end of the present war or even before in the event that you might be able to find a way to collect them (dollars) from my representative in America to whom I shall write and give him an order relative to this.

You understand until the final execution (payment) to the above amount an eight per cent interest will be added and paid together with the principal.

I thank you and I remain yours with respects.

The recipient,

(Signed) Eugenia Demotsis

Could such an unequal debt really stand? There could hardly be a greater inequality of position than that articulated in *Demotsis*. On appeal, Justice McGill did not hesitate to uphold the $2,000 debt, stating:

“Defendant got exactly what she contracted for according to her own testimony.”

The result that consideration will not be contextualised is accorded quasi-statutory basis: "if the requirement of consideration is met, there is no additional requirement of equivalence in the value exchanged." § 79 of the Restatement (Second) of Contracts.

As so often, the interesting point here is what that *does not* say. There is no reference, whatsoever, to the strikingly unequal position of the parties.

Further, there is venerable precedent for the proposition that debts cannot be altered subsequent to contract except via formal signed and witnessed deeds: *Foakes v Beer* [1884] UKHL 1; *Pinnel’s Case* [1602] 5 Co. Rep. 117a. Indirectly, this rejects modifications based on relational market power, since the original debt will stand regardless of contextual change.

However, there is an exception in relation to *performance*. The controversial case *Williams v Roffey Bros & Nicholls* [1990] 1 All ER 512 articulates an exception by which *requested* contractual changes can be credited, even absent a deed.

As with *Pakistan International Airlines,* the fact pattern in *Roffey* is of particular interest in relation to relative party position. The essential facts were that a carpenter ran out of funds, risking breach of a penalty clause by the employing developer. The court reasoned that, as the developed had offered additional payment, therefore payment should be due even absent a formal re-contracting deed.

This might be thought to be exactly where protection from exploitation of relative position is most required: there is a strong incentive for extraction of the break fee, at least if it is known, but this has nothing to do with the work of the carpenter. Allowing the modification on the basis that *statically* the developer had offered funds understates the dynamic by which performance is likely *dynamically* to attenuate once modification is allowed; see further A W Dnes, “The law and economics of contract modifications: the case of *Williams v. Roffey*.” *International Review of Law and Economics* 15(2), 225-240 (1995).

It is interesting to explore whether consideration or duress doctrines provide a better foundation for the assessment of relative party position, not least, as the courts seem to struggle with the boundaries between the two. For instance, in *Williams v Roffey*, the re-contracting argument succeeded in terms of consideration, whereas the defence of duress invoked against modification did not. This appears, perhaps, to be an anomalous result. Whether the core of these re-contracting doctrines is relative position, or freedom of contract, remains underexplored.

That is particularly so because the UK Supreme Court did not revisit the topic in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, on the basis that contractual interpretation could dispense with a re-contracting issue without invoking *Roffey*, at least in the Supreme Court*.* Therefore, the interaction of relative positions, duress, and consideration doctrines remains somewhat debatable.

Importantly, any such debate would need to be resolved if ever there were an amalgamation of common and civil law approaches to the issue of relative party position in general contract law. For instance, Professor Munro’s proposal for amalgamation of English and Scots contract law, preferred to apply a duress doctrine to relative party exploitation, rather than managing the issue through consideration doctrines. (This episode can be thought of as a UK equivalent of the role of the Lando *Principles of European Contract Law* within the EU; indeed it is said that Professor Munro provided his Anglo-Scots proposal to then-EEC Commission as an example of a possible approach to common law and civilian amalgamation concurrent to the Lando discussions, but without reply.)

There is also a relationship to estoppel of obligations, which seems to respond to relative party position: contrast, for instance, *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (allowing for reasonable contextual waiver without extinguishing antecedent right) with *D & C Builders Ltd v Rees* [1965] EWCA Civ 3 (denying waiver of debt where seemingly extracted from counterparty weakness).

1. **Undue influence doctrines**

The other prominent example of relative party position in general English contract law pertains to the equitable doctrine of undue influence. These cases arose from the equity jurisdiction which modified the common law under the terms of the Judicature Acts of 1873-1875. This is a particularly interesting aspect because the status of the undue influence doctrine as an equity-based *gloss* on common law doctrines perhaps provides an opportunity to modify obligations based on relative party position, without invalidating the underlying position under which English law so pointedly rejects any cross-cutting inequality doctrine.

Perhaps the most colourful case is that of *Allcard v Skinner* [1887] 36 ChD 145, a remarkable Victorian case concerning the age-old phenomenon of financial abuse following inducement into a religious order. Having become a nun, Miss Allcard left her entire property a Miss Skinner, who was the Lady Superior in the Sisters of the Poor Sisterhood which Miss Allcard had joined. Miss Allcard also passed on valuable railway stocks to Miss Skinner. Interestingly, the assets were applied to charitable purposes and neither Miss Skinner nor the Revd. Nihill, who had introduced Miss Allcard to Miss Skinner, received any personal benefit.

Rather, having renounced her vows, Miss Allcard later wanted the assets back. Despite a presumption that the resulting transaction was improper, Skinner succeeded in defending the claim on the basis that time had passed. The important point from the case is that it was arguably only this *laches* which barred recovery; an unequal relationship giving rise to undue influence was seen effectively to be non-displaceable. The particular facts of spiritual submission and obedience would thus have allowed some recovery had the claim been brought sooner, especially as the Sisterhood vows forbade seeking external advice.[[2]](#footnote-3)

The interesting wider point for economic dependence analysis is that the court expressly distinguished **exploitative** **conduct** from **poor foresight**:

What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimised by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors.

Expressly, the *Allcard* court would only intervene to set aside an improper bargain in situations of *active* victimisation, and not simply the **existence** of an inequality especially if created by the party suffering the loss. More recent examples of the same doctrine can be found in *Royal Bank of Scotland PLC v Etridge* (No 2) [2001] UKHL 44 and *Barclays Bank PLC v O’Brien* [1993] UKHL 6 (both refining this concept on more modern facts).

In summary, while English contract law claims to have no cross-cutting doctrine of inequality, one can perhaps see elements of Lord Denning’s position from *Bundy*, namely that there are many exceptions to that general proposition, even if the modern law has not permitted the articulation of a cross-cutting doctrine based on relative party position.

# Sector specific legislation

* 1. **The general B2B position under the Sale of Goods Act**

As we saw above, the express basis of the pointed rejection of any general doctrine of relative party position in English contract law is precisely that sector specific legislation should govern.

***Relative party position and information***

There are, of course, many examples of the relative position of parties amounting to relevant facts in statutory application. A critical issue concerns the availability and quality of information, and who can appropriate it: a strong relative party position would place boundaries on trading on information. Whereas, as we shall see, English law actively promotes trading on unequal insight.

As a starting point, consider the following two memorable cases under the pivotal Sale of Goods Act 1979 (updating its venerable 1893 forbear):

* *Harlington v Christopher Hull*[1990] 1 All ER 737 (CA): Auction catalogue described painting as by Gabrielle Münter, but the s.13 obligation for goods to match description was not triggered because, there having been expert evaluation, there was no sale *by* description. Therefore, despite the express description, the law on descriptions did not apply to the sale because of party knowledge.
* *Bramhill* v *Edwards* [2004] EWCA Civ 403: It is possible to sell a Winnebago too wide for UK roads without breaching the fitness for purpose protection in s.14 of the Sale of Goods Act, because there is no *actual enforcement* of the regulation on width.

Both results seem anomalous, since they seem to remove express buyer protections under ss. 13 and 14 of the Sale of Goods Act. Interestingly, that anomaly can be explained with reference to relative party position: there was no material inequality between the parties.

In *Christopher Hull Galleries*, the parties were on an equal footing, since both were experts; and presumably in *Bramhill* each party was equally delighted to drive a Winnebago on English roads despite the technical illegality of their actions. They might also have been equally ignorant of the rules.

There being no material inequality, freedom of contract could operate and the general position in English law against disclosure, *even in cases of informational inequality*, prevailed. As so strongly articulated in *Bell v Lever Bros*, the classic case cited above upholding all but the most exceptional mistakes: buyer beware! In *Bell*, an erroneous “golden parachute” agreement stood, despite the unknown availability of termination for cause following executive self-dealing in a cocoa cartel. By upholding the “golden parachute” contract, despite a shared and material mistake, the House of Lords narrowed English mistake law almost to vanishing point such that only the most egregious mistakes would ever form a defence. Therefore, significant informational inequalities will persist; not only that, they can be traded upon.

Implicitly, an information analysis underlies the posture here: there being no obvious reason why one or other party is better placed to evaluate information, the boundaries of verification were left to the free market.

The debate is analogous to the dispute between Kenneth Arrow and Harold Demsetz on the dynamics of information gathering, which posits that information gathering is incomplete, just for different reasons and with different recommendations.

There is a significant concern that not allowing information appropriation may diminish investment in information, not least, because it is a public good and is therefore *already* difficult to appropriate: See further, K J Arrow *Economic Welfare and the Allocation of Resources for Invention,* in *The Rate and Direction of Inventive Activity*, 609 (Nat’l Bureau of Econ. Research ed. 1962); H Demsetz "Information and Efficiency: Another Viewpoint," 12(1) Journal of Law and Economics: Article 2 (1969).

These classic cases on information suggest an important need to tread carefully around the extension of relative market power or economic inequality doctrines if such extension were to undermine incentives to gather information. There is scope for unintended consequences.

***The consumer position***

The position is, however, different in relation to sales governed by the Consumer Rights Act. Applying an EU-derived test, consumer sales benefit from the following protection:

A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

s.62(4) Consumer Rights Act 2015

As with the EU-wide position, there is exclusion of price and core subject matter terms from fairness control, reflecting the intervention by Professors Bradner and Ulmer, “The Community Directive on Unfair Terms in Consumer Contracts: Some critical remarks on the proposal submitted by the European Commission,” 28(3) Common Market Law Review 647 (1991).

There is also an important exclusion of free digital products from consumer protection scope, no matter the relative party size: S.33(1) and (2) Consumer Rights Act 2015.

However, beyond those important exceptions, there is expressly a test on relative party position.

In the leading case, *ParkingEye v Beavis* [2015] UKSC 67, there is interesting attention to the relative role of legal and market-based protections. There, an £85 overstay fee for parking beyond a free two-hour window was challenged on the basis of consumer protection law. There is a significant discussion of how relative position should be accounted for.

In essence, the UK Supreme Court skirted the issue that EU law had identified consumer loss of “national legal protections” as the baseline for analysis, reflecting difficulties in articulating such a concept in common law which does not focus on the idea of a nationwide codified position. Compare: *Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa* (Case C-415/11) [2013] 3 CMLR 89. There, the EU courts had struggled with the correct evidence specification considering that anti-consumer terms may be widespread. The focus on a *lost right* (*Aziz,* [68]) was designed to overcome the thorny issue that evidence of unfairness is difficult to articulate if terms are widespread.

However, the UK Supreme Court declined to refer this point to the EU courts. Instead of considering the position of the consumer relative to the law, the court instead applied a causative analysis by which:

 The question whether there is a ‘significant imbalance in the parties’ rights’ ***depends mainly*** on whether the consumer is being deprived of an advantage which he would enjoy under national law in the absence of the contractual provision.

*ParkingEye* [105] (emphasis added)

By adding the *depends mainly* gate to the underlying question of rights removal, the Court allowed contextualisation. Therefore, it is possible to argue that the comparison is between *contracts* and not *rights* per se. As a result, the relatively high parking fee could be upheld as justified since it had a legitimate aim.

The subtle difference between English and EU law here highlights the scope to use analysis of alternatives to promote market efficiency. Indeed, relative party position is important, and not merely the loss of a right per se, since without analysis of other options laws may prove overprotective (thereby increasing consumer costs). For example, failing to account for the fact that the parking facility in ParkingEye faces alternatives, and therefore does not have market power (absolute or relative) would result in overprotection.

***B2B relative market power: Enterprise Act 2002 investigations***

The Enterprise Act authorises the UK CMA to undertake what amounts to sector-specific investigation. Under the Enterprise Act, the CMA can undertake a Market Study followed by Market Investigation on a defined timeline.[[3]](#footnote-4) There have been examples of using these powers to address perceived inequality in bargaining power in supply chains. For example, the long-running Private Healthcare Market Investigation identified the concern that insurers may have buyer power over consultants,[[4]](#footnote-5) that is, a concern about unequal bargaining power in a supply chain. However, such findings are relatively rare.

***B2B relative market power: The Groceries Code Adjudicator***

A Groceries Code Adjudicator (GCA) was established in 2013. Designated grocery retailers are subject to GCA adjudication. The GCA has investigatory powers; the power to issue guidance should recurrent issues arise; an arbitration power; and a power to impose fines of 1% of turnover for breaches of the Groceries Code.

The Government undertakes a periodic review of the operation of the GCA. The latest review (2019-2022) drew positive conclusions.[[5]](#footnote-6)

***B2B relative market power: the Digital Markets, Competition and Consumers Act 2024***

The most striking example of recent sector specific regulation is however the Digital Markets, Competition and Consumers Act 2024. This is the UK’s new law designed to regulate large technology companies. Having addressed contractual and consumer contexts, the balance of this answer will now consider the DMCCA.

The DMCCA will face many challenges in articulating concepts of relative market power in a jurisdiction which, as above, has usually addressed such points indirectly.

By way of introduction, it is important to note that the DMCCA is materially different from the EU’s Digital Markets Act and Digital Services Act. Whereas the EU has passed specific laws with several bright line rules (e.g., Art 6 DMA on information and interoperability) the UK has created an administrative scheme whose key features are:

1. A process by which companies are designated so as to fall within scope, the headline rule being turnover >£25bn worldwide *or* >£1bn in the UK such that only very large companies are subject to the regime (ss.2-18);
2. If in scope, rulebooks can be written to regulate conduct (ss.19-37);
3. If in scope, a final offer arbitration system operates on pricing disputes (ss.38-45);
4. If in scope, a “pro-competitive intervention” (PCI) power arises which allows for extensive revisions to market structures and contracts (ss.46-56);
5. An obligation for large firms to report merger activity (ss.57-68).

As the DMCCA is brand new, there is only very limited decisional practice. There was, however, a momentous debate leading to its passage.

When were rules on relative market power or abuse of economic dependence introduced in your jurisdiction? Discuss how the rules and their implementation have evolved over the years.

The material elements of the DMCCA became live on 1 January 2025 (the consumer protection elements followed on 6 April 2025).

Every major aspect of the passage of the law was heavily debated.

Three contemporaneous think tank reports shed light on the DMCC passage:

* Institute for Economic Affairs: “[Digital Overload: How the Digital Markets, Competition and Consumers Bill’s sweeping new powers threaten Britain’s economy](https://iea.org.uk/publications/digital-overload-how-the-digital-markets-competition-and-consumers-bills-sweeping-new-powers-threaten-britains-economy/)” (D Auer, M Lesh, L Radic, 18 September 2023) provided a sharply critical voice.
* Prosperity Institute, “[Protecting prosperity and innovation in the UK’s digital economy](https://www.prosperity.com/media-publications/the-digital-markets-competition-and-consumers-bill-how-to-protect-prosperity-and-innovation-in-the-digital-economy/)” (S Dnes, F de Fossard, 5 December 2023) provided a contextualised account accepting aspects of the then-DMCC Bill while questioning others.
* Relatedly, a former CMA Chairman, Lord Andrew Tyrie, wrote [*Rebooting the CMA*](https://cps.org.uk/research/the-competition-and-markets-authority-a-reboot-for-the-2020s/#:~:text=In%20a%20new%20report%20with,deter%20uncompetitive%20and%20unfair%20trading.) with the Centre for Policy Studies in 2021.

*Protecting Prosperity* summarises the debate as follows:

“The pivotal moment in the intellectual genesis of the DMCC was the decision by HM Treasury to commission the report *Unlocking Digital Competition*, known more commonly as the Review reflecting the role of Professor Jason Furman as Panel chair. Similar reports were also published by the Stigler Center and the EU Commission…”

The report further notes the contemporaneous report by the US House Judiciary Committee before continuing:

“The Furman Review took a relatively balanced position, noting significant benefits from digital innovation including high quality, low-price advances. The role of large technology companies in lowering barriers to entry was also noted, in line with a nuanced view of the relationship between direct and indirect network effects.

However, the report expresses some concerns:

1. At the time, tipping into a particular market, as outlined above, was considered a core concern based on the perceived tipping characteristics of the day, especially relating to social media;
2. Markets were perceived to be increasingly concentrated, with the Review raising concerns about decreased economic efficiency from this, including price, innovation, and quality concerns;
3. Concerns were raised about data collection proving difficult for smaller entrants, impeding innovation, as was the tendency for large firms to buy out smaller ones;

4. Regulatory lag was noted based on information advantages in large firms.”

 *Protecting Prosperity, pp.25-26.*

Significantly, the Furman Review mostly articulated a concern about *speed* and the difficulties in *repeatedly proving relevant markets*.

However, the Report ultimately recommended retention of the consumer welfare standard for antitrust regulation, including in the new regime. It also advocated a hybrid appeal standard by which some type of appeal, and not just judicial review, would be available to those regulated by the new business-to-business regime.

As would be expected, there was robust debate of all material points throughout the legislative process. Examples of live debate from the Parliamentary process include:

* **Evidence of entrenchment of market power and “activities”:** there was significant debate about the scope of s.6, which determines the meaning of “strategic significance” as a gloss on market power. The debate resolved in favour of tests based on (a) size and scale ***in respect of a designated activity***; (b) use of a ***designated activity***; (c) extension of market power ***to other activities***; and (d) an ability to influence others’ conduct(***whether or not related to the relevant activity***).
* **Codebook powers: appropriate vs proportionate.** The crucial question of codebook scope was resolved in favour of a power to write *proportionate* rules, a wider *appropriateness* test ultimately being rejected (s.19(5)).
* **Codebook powers: pre-notification:** A somewhat extreme proposal for pre-notification before product launches relating to regulated activities surfaced in the House of Lords stage and was firmly rejected by the Government.
* **Codebook powers: proof of market power at activity boundaries:** There was significant debate about how far regulation could account for *other* activities. The conventional competition law rule on tying was retained, that is, there must be proof of market power impact from the tying: s.20(3)(c).
* **Relationship between rulebook and market intervention (PCI) power:** There were proposals more expressly to define the relative scope to (1) write rules and (2) alter market features, but this was ultimately unresolved.
* **The role of countervailing benefits**: Whether consumers benefit from conduct was a strong focus of debate. Ultimately, s.29 allows designated firms to run a defence that conduct is ultimately consumer-beneficial.
* **Market intervention (PCI) power: proportionality or useful basis?** Proposals to open up the market intervention (PCI) power so that it could be used if “useful” and not only if “proportionate” were rejected.
* **Appeal standards:** Reflecting the hybrid nature of the Bill in that it both regulated markets and addressed individual firms, there was significant debate as to whether an appeal or a judicial review standard was apt. This resolved in favour of a hybrid test under which, broadly, penalties are addressed with appeals including facts, but other matters are treated like general regulation and therefore are subject only to more deferential judicial review.
* **Remedies:** Proposals to create a new class action power based on the new designations were rejected.
* **Guidance documents approval:** An important limitation on the CMA’s power is the requirement for the Government to approve Guidance documents before they can be applied by the enforcer. This was included, after debate, to help maintain checks and balances.

In the debates, the essential dynamic was that the Government negotiated with the backbench MPs in its own party. Several of the successful amendments stemmed from this dynamic. By contrast, the Government did not hesitate to reject almost all of the extensive amendments proposed by the unelected House of Lords. This reflects the typical dynamic of UK legislative processes.

Which companies or economic sectors lobbied for the introduction of the rules?

There were many significant lobbying groups. Above all, startup representatives had a loud voice; bodies such as TechUK, the Coalition for App Fairness, and the Startup Coalition attained significant influence.

Publishers also attained significant influence, especially over aspects relating to final offer arbitration.

Large technology providers were also active in the debate and sought a continuing focus on end-consumer impacts.

Are these rules sector-specific ones or, on the contrary, general ones? In the latter case, are they applied to specific sectors or industries?

These are sector-specific rules for technology companies. There are no cross-cutting doctrines, per the contract cases explored above.

Has your jurisdiction enacted, or proposed the introduction of, *ex ante* regulation that deals with relative market power or economic dependence?

Ex ante regulation is only materially present under the new DMCC law.

There are instances of use of the Competition Act 1998 on an ex ante basis, notably the Google Privacy Sandbox case which oversaw the proposal by Google to remove cookies from Chrome, before ultimately deciding to keep them. There are many perspectives on this 5-year ex ante review.

Who is responsible for enforcing the rules?

To the limited extent that there are such rules, they are enforced by the UK Competition and Markets Authority.

Are there many applications of these rules?

As the law is still new, there are few applications of it. There are currently proposals to designate Google Search and the Apple and Google mobile ecosystems.

There are proposals to move existing Enterprise Act cases into the new law, notably in relation to cloud computing. Further, the Apple and Google mobile ecosystems proposals stem from an earlier Enterprise Act case.

These Enterprise Act cases were subject to a stricter remedial posture, notably requiring **proof** of customer benefits from remedies relative to identified problems: s.138(6) Enterprise Act 2002; compare s.29 DMCCA (providing for consumer benefits only as a defence).

# Criteria for the Definition of Relative Market Power or of Similar Concepts

## Definition of Relative Market Power or of Similar Concepts

Does the legislative text contain a definition and/or criteria of relative market power or similar concepts?

Yes: the sector-specific digital law (DMCC) contains a test reading closely on relative market power. For designation to occur under s.2, there is a need to show **both** “substantial and entrenched market power” and a “position of strategic significance”.

* s.5 DMCCA contains a market power test, which is defined on a 5-year forward looking basis. Moreover, the “substantial and entrenched” aspect has been emphasised in Guidance (DMCC Guidance, 2.54).
* Importantly, however, s.6 DMCCA speaks to a “position of strategic significance” in relative terms, including **size or scale**, **use by other undertakings**, **extension of market power** and **influence on others**. All tests read on the defined activity *except* the last one which is applicable regardless of whether the “influence” arises from the digital activity.

A hybrid position results: the CMA must prove *both* market power and relative market power (s.2(2)). As Guidance has articulated a wide range of qualitative and quantitative evidence reading on both consumer and competitor impact, the relative weight for *absolute* and *relative* market power analysis remains to be seen (see, e.g., DMCC Guidance, 2.76, articulating no “prescriptive” approach).

Do the criteria defined in the legislative texts differentiate according to the nature of the parties (customer or supplier) or the nature of the relationship?

There is no direct distinction to that effect. The new codebook and PCI powers are not so cabined. However, one should note what is essentially a customer benefit defence. The countervailing benefits defence mentioned above which is expressly based on “user benefits” (s.29).

To what extent is the concept of ‘intermediation power’ accounted for?

There is no express reference to this concept, but there are powers to rewrite contracts which are squarely aimed at intermediation power.

In particular, the final offer price arbitration provisions in ss. 38-45 are strongly aimed at perceived intermediation competition issues which were a strong focus of 2019-20 CMA work on AdTech (e.g., *Online Platforms and Digital Advertising Market Study*, Appendix R: Fees in the AdTech stack).

What elements of the criteria are defined in the legislation and what criteria have been developed through decision-making practice and case law?

There is a reasonable amount of legislative definition, but the interaction of the provisions remains to be developed as there are not yet cases.

Are there any legal or factual presumptions?

There are no particular presumptions. However, once a company is designated under s.2 DMCC, the power to regulate is extensive.

## Criteria Related to the Market

Are there criteria related to the market, the market structure or the market shares of the companies in the market?

The underlying designation criteria read strongly on market evidence. The references to *substantial and entrenched market power* (s.5) and *strategic market status* (s.6) expressly include structural measures including scale, but also more effects-based tests, notably switching analysis and whether there is in fact influence on others.

Is there a market definition? Is the definition of the relevant market a prerequisite?

Interestingly, formal market definitions were abolished for the DMCC. This is perhaps the most significant change of all from the reforms: “activities” and not “markets” are the focus of the DMCC (s.2).

There is however a residual role for the concept of a relevant market:

* As above, market power boundaries are still articulated in relation to certain regulatory aspects, notably technological tying (s.20(3)(c)). In practice this will require analysis of boundary disputes, as occurs in relevant market analysis.
* Relevant market concepts remain in place for **non-digital** Market Studies and Market Investigations under the Enterprise Act (albeit there are times when cross-market impacts can be considered: s.134 EA).

If one of the criteria is alternatives for the undertaking that is dependent on another undertaking with relative market power, how are these alternatives assessed? Are the alternatives discussed in relation to the relevant market and the substitutability criteria, or can the alternatives be found outside the relevant market (e.g. in other goods or services)?

There is some early Guidance on this point but it has yet to be applied. The DMCC Guidance states that “evidence of the effects of customers being unable to access the potential SMS firm’s product or service” is a relevant factor (2.71(d)). Furthermore, fn.52 states that there will be contextual analysis of the proportion of users including on a segmented basis. There are also factors not addressing the role of alternatives, such as “the proportion ***of other firms’ sales*** it facilitates” (emphasis added), which would indicate that the analysis is not only on whether there are alternatives but rather on the absolute and not relative nature of dependency. Early case law will be important on this point.

What is the relationship between relative market power and the classic institution of dominance? Is economic dependence or relative market power a criterion for dominance?

The existing rules have been retained under Chapter II of the Competition Act 1998.

Importantly, though, Guidance states that earlier case law is **not** necessarily to be applied: instead, there is a test for **coherence** (Guidance, 3.32).

Inevitably though there will have to be reference to existing concepts, such as technological tying analysis under s.20(3)(c) as noted above.

Has there been a finding of relative market power in parallel with a finding of dominance? Conversely, has relative market power been denied in the presence of dominance?

There has been no such finding yet. As noted above, several Enterprise Act cases have carried over to the new regime, including those on Mobile Ecosystems (Apple and Google). There is also a proposal to do the same in relation to cloud computing.

The will soon be precedent on this point, because existing parallel investigations such as Google (AdTech) and the resolution of aspects of the Google Privacy Sandbox case will need, in one way or another, to comport with pertinent aspects of the Mobile Ecosystems and Search designations if they proceed.

How does the analysis change in the presence of two-sided, or multi-sided, markets?

Several cases address two-sided markets but have not yet made determinations. Guidance suggests that the conventional UK position will be applied, that is, each customer group is to be considered but that there is also scope to consider inter-relationships (Guidance, 2.52). That is, there is no rule analogous to *Ohio v. American Express* 585 U.S. 529 (2018) by which net analysis would be mandatory.

## Criteria Related to the Company having a Relative Market Power

Are there criteria that related to the size, turnover, products, brands or other elements of the company under investigation of relative market power?

In relation to the new digital-specific law (DMCC), there is:

* A **turnover** test (>£25bn w/w OR £1bn UK)
* **Size** (“significant size or scale” as part of the Position of Strategic Significance required to be shown for designation **in addition to** Substantial and Entrenched Market Power.
* Some indirect analysis of **products** (since the analysis reads on *activities* – s.2).
* **Brands** and other elements could be relevant as part of the analysis.

How are these assessed?

Guidance suggests that qualitative and quantitative factors can be taken into account, as above. This can also be seen in current designation investigations. For instance, the relevant focal questions for Google Search are:

27. In particular, we plan to investigate the following issues:

1. Extent of competition between Google Search and other general search services on both the user and advertiser sides;
2. Extent of competition between Google Search and specialised search services;
3. Extent of competition between Google Search and other services such as AI interfaces eg AI assistants or AI powered search engines;
4. Barriers to entry and expansion for general search and search advertising services;
5. Whether Google can extend its power in general search and search advertising to other activities;
6. Whether Google can influence how other firms conduct themselves in relation to general search and search advertising.

## Criteria related to the Company in a Dependency Situation

Are there criteria that relate to the size, activity, turnover, economic situation, behaviour, specific investments or other elements related to the company under investigation of relative market power?

As regards the smaller company, there is not yet decisional practice as designation has yet to take place. In principle, both the legislation (s.19) and Guidance (3.6) indicates that the emphasis will be on consumer switching, that is, not a direct analysis of competitor impact.

This reflects the underlying three principles’ framing around fair dealing, open choice, and trust and transparency in terms of the users of designated activities. It will be interesting to see how far “user” accommodates competitors vs customers or a blend of the two.

If one of the criteria is alternatives for the undertaking that is dependent on another undertaking with relative market power, how are these alternatives assessed in relation to the dependent undertaking?

The Guidance applies the same concept as with the dominant firm analysis above (2.71) since aspects of the regime for both the dominant firm and the dependent one derive from the s.2 designation. Thus, as noted above, there is no clear position yet on how alternatives will be weighed against other factors; and there are some indications that significant use by a material proportion of users suffices regardless of alternatives (fn.52).

Additionally, we can note there is ample scope for the CMA to weigh the intensity of use by the smaller firm, e.g., proportion of other firms’ sales (2.71(c)) and the number of businesses using it (2.71(a)) which seems to be an indirect proxy for whether an alternative exists.

Is the cessation or abandonment of the activity considered as a valid alternative and, if so, under what conditions? To what extent are the economic consequences for the undertaking dependent on another undertaking with relative market power taken into account?

There is no specific comment on cessation of the use of the designated service and whether the relatively smaller business would thereby fail if it gave up the activity.

To what extent is a commitment to diversify activities or to work with different counterparties a criterion? To what extent is the behaviour and willingness of the dependent party to reduce the risk of dependency over time a criterion?

There is not yet decisional practice on point. There is no current indication that a business would be expected to reduce dependency over time, perhaps reflecting that the regime is cabined to the very largest firms only.

To what extent is the fault of the company in a dependency situation a criterion?

There is no mention of fault-based analysis in the new law. It will be interesting to see whether surrogates for fault from the Competition Act 1998, such as analysis of business efficiency, carry over to the new law.

How are these assessed?

N/A.

## Criteria related to the Imbalance of the Party’s Position

Are there criteria to capture the relative position of one of the parties in relationship to the other, or that capture a possible imbalance in the bilateral relationship between the parties?

There is no express power on imbalance. There is however a power designed to address negotiation imbalances, namely the final offer arbitration in s.38 which is essentially a requirement to submit to last-shot “final offer payment terms”. Importantly, this power only follows after breach of a prior order to deal on fair and reasonable terms (s.38(3)) and that there are no alternative digital regulation pathways left (s.38(4)).

How are they assessed?

These significant powers have yet to be used.

## Other Criteria and Considerations

Are there specific criteria depending on the industry or business model under investigation?

The regime only addresses digital markets so there is no such differentiation.

Are these criteria applied to current business relationships or also future or potential business relationships?

The regime addresses existing market power and strategic status. It follows that some future relationships may be in scope. For example, the requirement for designated parties to file certain merger notices (s.57) would address future consolidations. It is important to note that the evidence base for market power underlying designation reads on a five-year forward-looking basis (s.5).

What kind of economic assessments, studies or industry expert opinions are used to refine the criteria?

There are only very early indications, but it is significant that survey data on search and AI use was commissioned in relation to the potential designation of Google Search. That suggests that detailed expert reports will remain relevant, just as they were in antecedent Enterprise Act cases.

What discretion does the enforcers have?

There was a large and consequential debate about the relative merits of judicial review and a full fact-based appeal in the debate leading up to the DMCCA.

Existing laws allow a full merits appeal for matters involving individual companies (s.46 CA98) whereas the more deferential judicial review standard applies to market wide regulation (s.179 EA 02).

The DMCCA in simultaneously (1) regulates markets and (2) addresses individual firms, so there are elements apt for both appeals and judicial review.

The Furman Review advocated a hybrid appeal standard somewhat modelled on the EU’s General Court, by which some factual interpretation could be challenged. Think tank proposals such as *Protecting Prosperity* advocated a hybrid appeal standard to promote due process protections (p.48):

“A hybrid appeal standard should be used. This was recommended by the Furman Review. It provides a middle path to give companies reasonable due process protections. Notably, judicial review should also be avoided because it is slow. A stricter review standard will encourage getting it right the first time.”

The ultimate resolution in the DMCC was to adopt a hybrid approach reading (broadly) on whether a fine is at issue: s.103(2)). There is a high level of technical detail reading across the DMCC and Enterprise Acts, but in essence, the position is that fine give rise to appeals whereas other matters give rise to judicial review.

# Abuse of Relative Market Power

Is there a requirement of abusive behaviour (or a similar concept), or is the imbalance of power and dependency sufficient for legal regulation?

This is only relevant in English law to the extent that the DMCC is engaged, because general contract law lacks such a concept.

Regulation under the DMCC can proceed from proof of **both** market power **and** strategic status, without actual abuse.

The resulting powers to write codes and regulate prices are gated on promoting fair dealing, open choice, and trust and transparency objectives (e.g., s.19(5)). Thus, although there is no obligation for the CMA to prove abuse before intervening, there is a need to comport to these broader aims.

It is interesting to note that the antecedent regime of Enterprise Act Market Studies and Market Investigations, on which the DMCC is largely modelled, did not specifically require abuse but rather an Adverse Effect on Competition (AEC) which can be thought of more as a market imperfection than abuse per se.

If there is a requirement of abusive conduct, is it the same as or different from abuse of a dominant position?

The exact similarities, or not, between Chapter 2 abuse of dominance and DMCC regulation remain to be seen.

Is a restriction of competition necessary for an abuse to be found and, if so, how is it assessed?

The purposes-based approach to regulation noted above obviates any specific need to prove abuse for regulation.

Does the definition of abusive behaviour focus on exploitative or exclusionary behaviour, or both?

In principle, both types of abuse could be covered, but this will only become clear with enforcement activity. Historically, the CMA has strongly emphasised exclusionary activity with several notable exceptions (e.g., hydrocortisone excessive pricing, 2008-2018).

What kind of abusive conduct is most often the focus of intervention?

This remains to be seen. The early indications from the Google Search and Mobile Ecosystems designation proposals suggest an emphasis on exclusionary conduct. For instance, the [press release](https://www.gov.uk/government/news/cma-to-investigate-googles-search-services) regarding the Google Search investigation notes predominantly exclusionary harm (while also noting possible exploitation):

 “The issues that will form part of the CMA’s investigation include:

* “Weak competition and barriers to entry and innovation in search. The CMA will assess how competition is working and if Google is using its position to prevent innovation by others. This includes whether barriers to entry are preventing other competitors from entering the market, in particular whether Google is able to shape the development of new AI services and interfaces, including ‘answer engines’, in ways which limit the competitive constraint they impose on Google Search.
* Possible leveraging of market power and ensuring open markets. This will include investigating whether Google is using its position in the market to self-preference its own services, for example specialised search services covering shopping and travel.
* Potential exploitative conduct. This will include investigating the collection and use of large quantities of consumer data without informed consent, and the use of publisher content without fair terms and conditions (including payment terms).

Potential conduct requirements could include, for example, requirements on Google to make the data it collects available to other businesses or giving publishers more control over how their data is used including in Google’s AI services.”

This seems to indicate an interest in making data available or enabling more control over data by content producers, rather than any direct regulation of price.

Are there more findings of exploitative or exclusionary abuse?

There are not yet any such findings either way as the regime is new.

Are there more price or non-price infringements?

There are not yet any such findings either way as the regime is new, but the above press release suggests a focus on non-price factors.

Is such conduct found in existing business relationships or also in future, potential ones (e.g. refusal to deal)?

DMCC designation will span “activities” (s.2). The breadth of this crucial term will define significant boundaries relative to duties to deal.

Indeed, the scope to regulate adjacent to those activities was hotly contested in the Parliamentary debate. The core question is the relationship between that activity and others in relation to the specification of conduct requirements (the s.20 rulebooks) and the PCIs.

The power to regulate conduct is expressly based on conduct “in relation to a relevant digital activity”, and there are several references to the “activity” in the s.20 specifications of possible rule scope. There are, however, some notable ambiguities which have yet to be settled

***Activity boundaries***

Under s.20(3)(c), there is a need to model market power impacts from *other* related activities. Significantly, the first draft of the Guidance understated this crucial element and it was only after this was pointed out by stakeholders that analysis of market power impacts across product boundaries was increased.

As the CMA’s consultation response noted:

4.15 In relation to ‘materially’: the CMA has made amendments to paragraph 3.15 to more closely reflect the statutory language in section 20(3)(c). A new paragraph has also been added at paragraph 3.16 providing more detail on how materiality will be assessed for the purposes of the permitted type in section 20(3)(c).

The following Guidance on product boundaries was therefore added:

* 1. As part of that assessment, the CMA may consider factors including, but not limited to:
1. the closeness of the commercial and/or technical relationship between the activities;
2. the extent to which consumers and/or businesses are likely to view and/or use the activities in conjunction or alongside one another;
3. the extent to which inputs to and/or outputs from one activity could be relevant to carry out another activity;
4. the likely magnitude of the effect on consumers and/or businesses of the relationship between the activities.

***Other provisions not specifically linked to activities***

It is notable that the data fairness conduct requirement power (s.20(3)(g), restrictions on users (s.20(3)(f)) and interoperability restrictions (s.20(3)(e)) are not *expressly* cabined on “activities” – although, as above, the s.19 scope to grant *any* s.20 rule must in some way link to an “activity”. Precisely how these boundaries are defined in practice will be significant, as they could in principle encompass a duty to deal, but are not express on the point.

The PCIs power is based on matters “relating to a digital activity” (s.46(1)(a)), the permitted types of conduct requirement under s.20 include some which are not specifically cabined to the activity.

What remedies are available?

The primary remedies are to write conduct rules (s.19) and to intervene to alter markets with pro-competitive aims (PCIs, s.46).

In the event of breach, extensive fining powers are available (ss.85-92) and criminal enforcement is available for certain obstructive acts (ss.93-98). The maximum fine for failure to comply with competition requirements under the DMCC is a fine of up to 10% of group turnover for fixed fines; 5% of daily turnover for a daily rate penalty, or a combination thereof (s.86(4)). The relevant measure is worldwide turnover (s.86(5)).

What discretion do enforcers and judges have to reshape the commercial relationship between the parties (e.g. to modify the terms of the contract in favour of one of the parties, to add contractual provisions to the contract)?

There are very extensive powers to pass conduct rules (s.19) and to alter markets using pro-competitive intervention (PCI) powers (s.46). In effect, this will reshape commercial relationships. The PCI powers inherited the Enterprise Act remedies, and therefore extend to rewriting contracts and even breaking up companies (DMCC s.51 (1) referring to Enterprise Act 2002, Sch. 8 rule 2-8):

* contractual changes,
* provision of supply,
* unbundling remedies,
* non-discrimination remedies,
* preferential provision, and
* departures from a published price list.

There are further powers to invalidate shareholdings, prohibit acquisitions, and divest businesses or parts of them (Enterprise Act, Sch 8 Rules 9, 12 and 13).

There are also powers to trial a PCI (DMCC, s. 51(3)).

Are there instances where mandatory contract law provisions have been introduced under *ex ante* regulation to deal with relative market power and economic dependence?

There is no recent example of ex ante mandatory contract terms based on relative market power.

The closest that the CMA has gotten is the Privacy Sandbox case by which the CMA oversaw ex ante product development. However, it did not regulate contract terms. There are many examples of transparency remedies from the Enterprise Act, but these are on an ex post basis. Both examples are based on conventional market power analysis and not relative market power.

Are abuses of relative market power punishable by fines?

The fining regime outlined above applies to breaches of the DMCC regime. It follows that a fine is available for a failure to follow and enforcement order following the breach of a conduct rule, for breaching a price regulation (“final offer”) order, a PCI breach, or a commitments breach (s.85(2)).

Are there differences between remedies ordered by courts and other administrative bodies (eg competition authorities)?

There are significant differences. As articulated at the start of this response, the courts reject any general business-to-business relative market power test. To the extent that there is such a regime, it therefore derives entirely from the DMCC enforcement by the CMA.

# General Assessment and Conclusion

You are invited to draw conclusions on the main findings in your jurisdiction and to recommend improvements to the competition rules in your jurisdiction.

Much can and has been said about the relative merits of the DMCC Act and that which went before. Here, it will simply be noted that there are elements of the Act bring widely recommended reforms. For instance, there is reasonable consensus about the difficulties of repeatedly proving market definition in digital markets.

This is a long-standing debate going back at least to the 2009-2013 exchanges between Louis Kaplow and Gregory Werden in the *Antitrust Law Review* (compare, e.g., L Kaplow, “Market Definition: Impossible and counterproductive” 79(1) *Antitrust Law Journal* 361 (2013) and G J Werden, “Why (Ever) Define Markets? An Answer to Professor Kaplow 78(3) *Antitrust Law Journal* 729 (2013)). The move to a market effects rather than market definition focus in digital markets was perhaps overdue.

The difficulty arises in relation to the “reaching” from the DMCC process. For instance, the pointedly rejected proposal for pre-notification of product launches by designated firms, as the more strident voices in the House of Lords process had advocated, would be essentially a new merger control regime but for new products. It would engage all of the shortcomings of the worldwide merger control regime and it was rightly rejected by the Government.

The episode highlights the crucial importance of keeping relative market power analysis on an evidence basis to avoid anti-consumer impacts from undue intervention within supply chains. While there are certainly instances in which intra-supply chain issues merit careful analysis, there is an attendant risk of rent-seeking intervention from the implicit power to alter markets at a much more fine-grained level than before. Regulators will need to be wary of lobbying.

It is also notable that English law more broadly rejects analysis of relative party position so pointedly. This is perhaps less well known in competition law circles. Ultimately, English contract law, and especially the Sale of Goods Act regime, remains very popular and accounts for a large share of worldwide contracting. Its popularity despite its express and total rejection of relevant market power doctrines sounds a note of caution about undue extension of doctrines based on relative party position.

Should market criteria (eg market shares) be taken into account in the application of provisions on relative market power?

There are many issues with a sole or even predominant focus on market shares:

* There is the important comment of the US Supreme Court in *US v General Dynamics* 415 US 486 (1974) that “Statistics concerning market share and concentration, while of great significance … not conclusive indicators of anticompetitive effects.”
* More waggishly, there is comment from Thurman Arnold that arguing about scale per se is “arguing whether tall buildings are better than low ones.” *The Bottlenecks of Business,* 122 (1940; reprint Beard Books 2000).
* More recently, a senior UK competition law enforcer commented: “If market definition is the focus of the case, then something is wrong.” (M Walker, *Concurrences* Innovation Law and Economics Conference (London, 23 April 2024).

While it is true to say, as the former CMA Chairman Lord Tyrie noted at the DMCC debates, that there is “No need for a crystal ball as we have the history” (HL Deb (Jan. 22, 2024) (835) col. 355GC) it is important to note that the criticism was not of business scale but rather of the speed and effectiveness of intervention. For instance, Lord Tyrie’s 2021 report criticises detachment from perceived consumer detriment, and certainly does not advocate a myopic focus on *n+1 competitors* as its policy goal. Moreover, the Furman Review itself did not object to scale.

So, it is not scale alone that raised a concern but rather *undue* and perhaps *repeated* market tipping. It will be critically important to consider the possibility of scale benefits as the expression of pro-consumer growth in any regime based on relative power precisely because it is one of the most potent means by which consumers benefit, thereby justifying the enforcement regime.

It follows that a focus on shares alone ought to be avoided. It is reassuring that many factors besides shares alone are present in the assessment of the relative positions of the parties in the DMCC Act and Guidance.

Are relative market power provisions necessary for competition to function?

There are great challenges in making a categorical statement as to the relative merits of absolute and relative market power analysis. For instance, a strong argument can be made that the Schumpetarian challenge of competition *for* rather than *within* the market can be the most consumer-friendly outcome, at least in some settings. See, e.g., J Coniglio, L Kiss, G Castiglia and H Houalla, “[A Policymaker’s Guide to Digital Antitrust Regulation](https://itif.org/publications/2025/03/31/a-policymakers-guide-to-digital-antitrust-regulation/),” 31 March 2025.

At the same time economic analysis may indicate that in-market competition has an important role to play in disciplining price, and that may sometimes imply a degree of relative rather than absolute market power analysis. A striking recent example comes from the US AdTech litigation, which seems to indicate that preventing switching within advertising supply chains may have effectively doubled AdTech prices for publishers: *US v. Google LLC* 1:23-cv-00109 (E.D. Va., Apr. 17, 2025) \*77. While such analysis might well proceed under absolute market power analysis, and in fact often does, there is a very real question around the role of relative power within supply chains if there are adverse market outcomes.

Are they generally justified as part of the competition rules?

As the UK has so firmly rejected a cross-cutting inequality doctrine in contract law, the experience pertains only to sector-specific scenarios. Moreover, there is no evidence base in general competition law on which to assess the role of relative market power since the innovation here is only in digital and even there it is new.

Are they justified in certain sectors?

As above, the only real experience is with digital and perhaps with groceries. There are special rules in relation to defence and media, but they are based more on non-economic values than any specific relative market power concern. It is too early to draw any definitive conclusion from the new digital regime. As noted above, the groceries regime has received positive reviews under a periodic Government analysis.

Are the current rules predictable for companies?

Whether the law relating to digital companies is seen to be clearer after the DMCC than before might well be its single most pivotal test.

1. The denotation UKHL refers to the UK House of Lords which is now its Supreme Court. [↑](#footnote-ref-2)
2. See further P Ridge, “The Equitable Doctrine of Undue Influence Considered in the Context of Spiritual Influence and Religious Faith: *Allcard v Skinner Revisited in Australia*,” 26(1) UNSW Law Journal 66, 69-70 (noting Cotton LJ dissent providing for some recovery depite *laches*). [↑](#footnote-ref-3)
3. See s.5 and Part 4 of the Enterprise Act 2002 (especially, s.130A, s.131A, s.131B and s.137). The interaction of these provisions was considered by the Court of Appeal in relation to the CMA’s Mobile Ecosystems and Cloud Gaming Market Study: *CMA v Apple* [2023] EWCA Civ 1445; the CMA’s ability to investigate new issues despite the timing elements of the legislation was upheld by the Court on the basis that an undue gap in regulation would otherwise result. [↑](#footnote-ref-4)
4. Private Healthcare Market Investigation, Final Report, Theory of Harm 4 (p.2). [↑](#footnote-ref-5)
5. Department for Business and Trade, Groceries Code Adjudicator: Statutory review, 2019-20 (July 2023). [↑](#footnote-ref-6)