Reckoning

On *Genzyme*

In March 2004 the Competition Appeal Tribunal found that Genzyme, a pharmaceuticals company, had abused its dominant position in the supply of drugs for the treatment of Gaucher disease, by adopting a pricing policy that had the effect of foreclosing the downstream supply of homecare services associated with those treatments.

At first sight *Genzyme* is similar to the well-rehearsed example of an "upstream" monopolist of a raw material using its dominance in that market to monopolise a related "downstream" market that is dependent on that raw material. However, the market structure in *Genzyme* does not fit neatly into "upstream" and "downstream" markets, and the way that Genzyme's conduct is likely to have affected the competitive process is different to that in the example of the raw material monopolist.

The *Genzyme* judgment does not give due attention to this difference. This matters because *Genzyme* cuts across a problematic area of competition law. The case provided an opportunity to clarify whether — and if so why — the law on abuse of dominance recognises a distinction between the obligation on a dominant firm not to harm competition that already exists, and the obligation to facilitate new competition where this could be introduced. It is unsatisfactory that the Tribunal's description of competitive effects in *Genzyme* prevented this from being addressed in its decision. This omission is best revealed by a closer look at the supply chains relevant to the case.

Visit **http://www.reckon.co.uk/open/genzyme** to discuss the issues raised by this article, contribute further thoughts, and access links to related content.

The author, Nicholas Francis, is a partner in Reckon LLP. He takes a keen interest in the economic rationale for the law on abuse of dominance. Reckon is a consultancy firm providing economic analysis of regulation and competition issues. For further information, please visit **http://www.reckon.co.uk** or contact Nicholas Francis on 020 7841 5859 or n.francis@reckon.co.uk.

Introduction

1. In March 2003 the Director General of Fair Trading ("DGFT") found that Genzyme Limited ("Genzyme") had infringed Chapter II of the Competition Act 1998.[1]

2. The DGFT decided that Genzyme held a dominant position in the supply of Cerezyme, a treatment for Gaucher disease, and had abused this dominant position in two (related) ways. First, by "bundling" the supply of Cerezyme to the NHS with associated delivery and homecare services, and second by engaging in a "margin squeeze" against a provider of these delivery and homecare services. This conduct was considered to prevent competition in the home delivery of Cerezyme and in the provision of associated homecare services. Genzyme was fined £6.8 million and required to change its pricing policy.

3. Genzyme appealed to the Competition Appeal Tribunal (the "Tribunal"). Although the Tribunal set aside the DGFT's finding on the bundling abuse, it rejected the appeal against the margin squeeze.[2] Genzyme's fine was reduced to £3 million, and the parties asked to negotiate a settlement to bring the margin squeeze abuse to an end.[3]

4. In this article we discuss the theory of competitive effects put forward in the Tribunal's margin squeeze case against Genzyme, taking as given the Tribunal's analysis of market definition and dominance. (We leave aside the DGFT's finding of the bundling abuse, which was not upheld on appeal.)

5. The article is structured as follows:

   (a) first, we summarise the facts of the case and the finding of the Tribunal;

   (b) second, we take a closer look at how Genzyme's conduct is likely to have affected competition, focusing on the relevant supply chains, and find a different interpretation of competitive effects to the Tribunal;

   (c) third, we explain why this difference matters and argue that, had this been recognised, *Genzyme* should have provided valuable insights on the law on abuse of dominance; and

   (d) finally we summarise our conclusions.

The Tribunal found that Genzyme had eliminated downstream competition

6. Genzyme supplies Cerezyme. Cerezyme is a patent-protected treatment for Gaucher disease, a rare condition in which the body lacks an enzyme used to degrade waste material. Around 190 patients in the UK are treated with Cerezyme by the NHS and the treatment costs approximately £100,000 per patient per year (*Genzyme* at paragraphs 28 and 37).

[1] OFT Decision 27 March 2003, Case No CA98/3/03.
[2] *Genzyme Limited v Office of Fair Trading*, Case No 1016/1/1/03 [2004] CAT 4 ("*Genzyme*").
[3] At the time of writing the question of how exactly the Tribunal's direction would be implemented was yet to be resolved.

7. The majority of these patients are treated at home. Typically, a prescription is sent by the specialist consultant or GP to a provider of "homecare services", who arranges for the prescription to be dispensed, delivers Cerezyme to the patient, and undertakes other associated homecare services. These services vary across patients, but include the provision of nurses to administer Cerezyme to those patients who do not self-infuse, assistance with the patient's refrigerated storage of the drugs, and the operation of a 24-hour patient helpline. Cerezyme is therefore provided to patients as part of an integrated package of homecare services. The margin squeeze abuse relates to these homecare services.

8. Healthcare at Home initially started providing homecare services to Gaucher patients in 1998, when it entered into agreement with Genzyme to be its exclusive provider of homecare services. Under this agreement, Healthcare at Home purchased Cerezyme from Genzyme at a fixed price per unit, and was remunerated by Genzyme for providing homecare services to patients,[4] and remunerated by the NHS for the supply of Cerezyme. No other company was engaged in the provision of homecare services for patients treated with Cerezyme.

9. In late 2000 Genzyme informed Healthcare at Home that it would terminate its agreement with Healthcare at Home in May 2001, and would be setting up its own in-house provider of homecare services. Thus, from May 2001, Healthcare at Home was unable to earn a fee from Genzyme for the provision of homecare services.

10. In July 2001 Healthcare at Home asked Genzyme to supply it with Cerezyme on "reasonable commercial terms" (*Genzyme* at paragraph 118). If Genzyme was to supply Cerezyme to Healthcare at Home at a price sufficiently below the NHS list price, Healthcare at Home would be able to remain in the market and supply Cerezyme with integrated homecare services to the NHS. This request was not granted. Even so, pending the DGFT's investigations, Healthcare at Home continued to provide homecare services to Gaucher patients, albeit on an uneconomic basis, with no effective margin between its buying and selling price of Cerezyme.

11. The Tribunal found as follows (at paragraphs 552–554):

> "Genzyme's pricing policy constitutes a margin squeeze, the effect of which is to force Healthcare at Home to sustain a loss in the provision of Homecare Services to Gaucher patients. We also accept that no undertaking, regardless of how efficient it may be, could trade profitably in these circumstances in the downstream supply of homecare services …. We also accept that if Genzyme's pricing policy since May 2001 continues unaltered, it is likely that Healthcare at Home will exit the market … In those circumstances we share the OFT's conclusion that the effect of Genzyme's margin squeeze is to monopolise the supply of Homecare Services to Gaucher patients in favour of Genzyme, and to eliminate any competition in the supply of such services to Gaucher patients…."

12. In short, the Tribunal found that following the creation of its own in-house provider of homecare services for patients treated with Cerezyme, Genzyme's operation of a pricing policy that would eliminate the only other provider of these homecare services was an abuse under Chapter II of the Competition Act.

[4] Under this agreement, Healthcare at Home also delivered to hospitals, on Genzyme's behalf. We ignore the delivery of Cerezyme to hospitals because it is not central to the theory of abuse supported by the Tribunal.

A closer look at the supply chains provides a different picture of events

13. We now consider in more detail the competitive effects in *Genzyme*. We structure the analysis according to three scenarios, which correspond to Genzyme's conduct before the margin squeeze, under the margin squeeze, and finally conduct that would be consistent with the Tribunal's direction.

14. Our analysis focuses on the nature of competition, and relevant supply chains, in each scenario. This reveals that Genzyme did not eliminate competition in a downstream market, and that the competitive effects in *Genzyme* were more complex than implied by the Tribunal's decision.

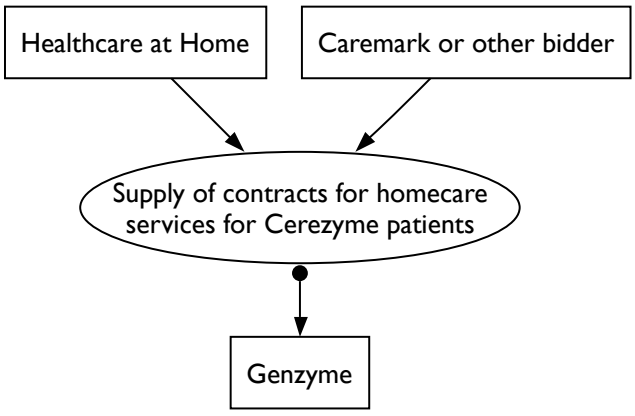
Scenario (1): Genzyme out-sources homecare services

15. Before the introduction of Genzyme Homecare, the structure of supply and nature of competition is best understood as a two-stage process.

16. In the first stage, Genzyme appointed Healthcare at Home as its exclusive provider of homecare and delivery services for patients treated with Cerezyme. This appointment arose from a competitive bidding market, in which Genzyme was the buyer and Healthcare at Home the supplier. Healthcare at Home replaced the previous supplier (Caremark) and would presumably have faced competitive constraints from other providers of homecare services when preparing its winning tender to Genzyme.

17. The competition to supply Genzyme with a homecare services contract is illustrated, in simple terms, in Figure 1(a).

Figure 1(a): Competition for the homecare contract

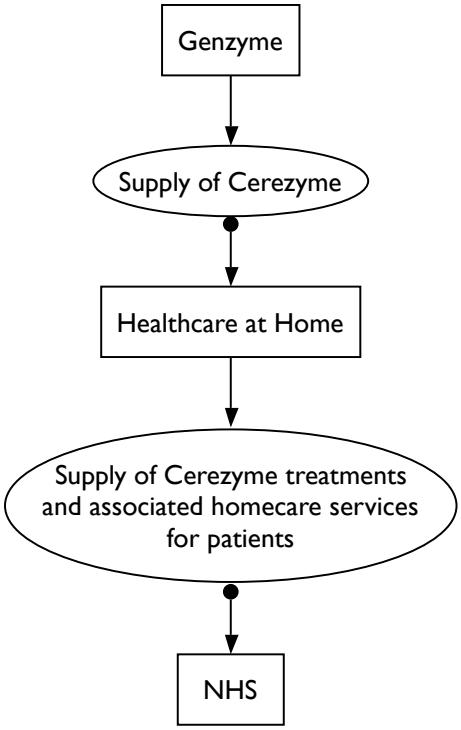


18. In the second stage, during the operation of the exclusive agreement, Healthcare at Home purchased Cerezyme from Genzyme and sold this on to the NHS (at a price set by Genzyme), providing an integrated package of Cerezyme and homecare services. Healthcare at Home's operation in the market for supply to the NHS was entirely contingent on the contract it won in the first stage, when it faced competition in a bidding market.

19. However, during the operation of the agreement, Healthcare at Home was the only supplier of integrated packages of Cerezyme and homecare services to the NHS. NHS consultants and doctors had no choice of supplier of homecare services. The only competition that Healthcare at Home faced was from the threat that its contract with Genzyme would be terminated in favour of a rival.

20. Figure 1(b) illustrates that during the life of that contract there was no competition in the supply of Cerezyme and homecare services to the NHS.

Figure 1(b): Cerezyme supply under the contract

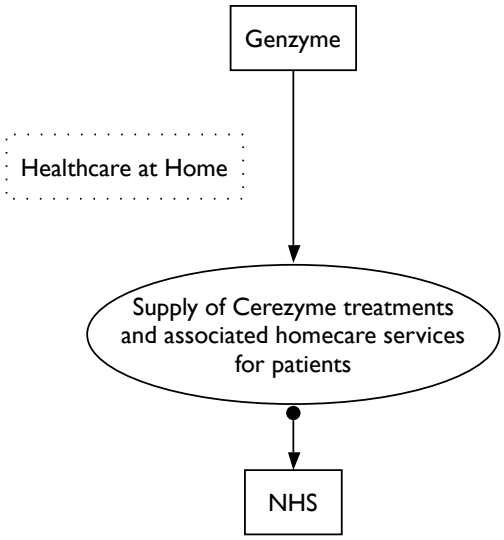


Scenario (2): Genzyme undertakes homecare service in-house

21. Once Genzyme had introduced its in-house operation, Genzyme Homecare, and the contract with Healthcare at Home had been terminated, the structure of supply changed. Genzyme no longer purchased homecare services from Healthcare at Home, and Healthcare at Home no longer operated in any bidding market for Cerezyme homecare services.

22. In the event, Healthcare at Home continued to provide homecare services on an uneconomic basis. However, the Tribunal reasoned that this was not sustainable and only relevant to the short-run period while the case was being decided. Therefore, absent the prospect of a competition law decision against Genzyme, the market structure under Scenario (2) would simply reflect Genzyme's direct supply of Cerezyme treatment and associated homecare services to the NHS. This is shown in Figure 2 (overleaf).

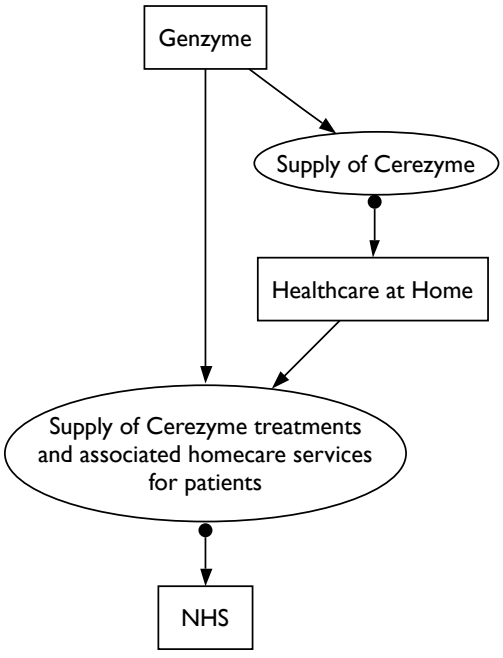
Figure 2: Genzyme's "margin squeeze"



Scenario (3): Genzyme adopts the Tribunal's remedies

23. The Tribunal in *Genzyme* directed the parties to reach agreement for remedies that would bring the margin squeeze abuse to an end. This should allow sustainable competition between Genzyme and Healthcare at Home (and potentially other suppliers of homecare services) in the supply of Cerezyme treatments and associated homecare services to the NHS. Figure 3 shows the supply chain that could arise under this scenario.

Figure 3: The Tribunal's direction



Summary of competitive effects in Genzyme

24. A margin squeeze is usually understood to take place when a firm that is dominant in an upstream market uses its control over the supply of a key input to harm the competition that takes place in a downstream market in which suppliers are dependant on access to that input.

25. For instance, in *BSkyB* the DGFT investigated the hypothesis that BSkyB, as a dominant supplier of certain TV wholesale channel markets, had harmed competition in the associated retail markets for pay-TV packages, by setting too high a price for wholesale channel supply to rival pay-TV retailers who competed with it in these downstream retail markets.[5]

26. The analysis set out above helps demonstrate that Genzyme's conduct, which effectively moved the supply chain from Scenario 1 to Scenario 2, is not likely to have eliminated competition from any downstream market. Table 1 summarises our analysis, showing how competitive conditions in different parts of the supply chain would be expected to vary between the three scenarios.

Table 1: Exposition of Competitive Effects

	Supply of contracts for homecare services for Cerezyme patients	**Supply of Cerezyme**	**Supply of Genzyme treatments and associated homecare services for patients**
Scenario 1: Genzyme out-sources delivery and homecare services	Competition effective *Competition takes place in a bidding market in which Genzyme is a buyer*	No effective competition *Genzyme dominant, and supplies Healthcare at Home under exclusive contract*	No effective competition *Operated by Healthcare at Home under exclusive contract with Genzyme*
Scenario 2: Genzyme undertakes delivery and homecare in-house	No demand for service *Scenario 2 assumes that Genzyme undertakes delivery and homecare in-house*	No effective competition *Genzyme dominant*	No effective competition *Supplied by Genzyme using its in-house division, Genzyme Homecare*
Scenario 3: Genzyme adopts the Tribunal's remedies	Demand for service unlikely *Potential suppliers of homecare services are able to supply Cerezyme treatments directly to patients*	No effective competition *Genzyme dominant*	Effective competition likely *Competition between Genzyme, Healthcare at Home and other potential suppliers*

27. In taking homecare services in-house (Scenario 2), rather than out-sourcing (Scenario 1), Genzyme did not threaten or eliminate competition in the supply of Genzyme treatments with associated homecare services (the right hand column). Genzyme's decision to take homecare in-house can be understood as a decision not to buy from a potential bidding market (the left hand column).

[5] OFT Decision 17 December 2002, Case No CA98/20/2002.

28. At the same time, the fact that Genzyme's commercial policy was not in line with what turned out to be the Tribunal's direction (Scenario 3) meant that Genzyme failed to take an opportunity to introduce new competition, where this had not previously existed (the right hand column).

29. Our interpretation of events is therefore at odds with the rhetoric of the Tribunal's decision. The Tribunal makes repeated reference to Genzyme's conduct "eliminating competition". However, it seems awkward to describe an undertaking as having eliminated competition if that competition did not exist in the first place — or if it had only existed due to the unsustainable market presence of a deliberately loss-making supplier.

30. Despite the Tribunal's use of margin squeeze terminology and its reference to past cases such as *Commercial Solvents*,[6] *Genzyme* does not fit well with this category of abuse. Both *before* and during the margin squeeze, NHS consultants faced no prospect of sustainable choice of provider of homecare services for patients treated with Cerezyme. The downstream market had always lacked effective competition.

The case should have provided useful insights on competition law

31. The presentation of supply chains above offers a different interpretation of the way in which Genzyme affected competition. Genzyme did not eliminate effective competition that existed on a downstream market. Instead, Genzyme stopped *buying* a service from a third party, and, at the same time, failed to institute a new commercial policy that would allow this party to continue its previous line of business by starting to compete with Genzyme in a downstream market. Does re-stating the case in this way make any difference?

32. At one level, no. Regardless of the details of the historic relationship between Genzyme and Healthcare at Home, the Tribunal's direction seems to promote competition. It should guarantee that NHS consultants have a choice between Genzyme and other providers of homecare services when prescribing Cerezyme to their patients. Different suppliers of homecare services for Gaucher patients would be expected to compete, on a sustainable basis, for consultants' prescriptions.

33. However, the application of competition law is more intricate than the identification of ways to enhance competition,[7] and the law in relation to a dominant undertaking's "duty to deal" is not, in general, well-defined.[8] Because of this, the clearer a court can be in describing the competitive effects that lie at the heart of a finding of abuse, the more able other firms will be to balance competition law compliance against the search for attractive and innovative commercial strategies. In *Genzyme*, a more detailed exposition of competitive effects would have been valuable, since the case cuts across a troublesome issue in the law on abuse of dominance: the distinction between a dominant firm's responsibility to protect competition that already exists and its responsibility to facilitate new competition where this could be introduced.

---

[6] *Commercial Solvents v. Commission*, Cases 6 and 7/73 [1974].
[7] This is why other competition policy tools such as "market investigations" under the Enterprise Act are important.
[8] Subiotto, R and O'Donoghue, R (2003) "Defining the Scope of the Duty of Dominant Firms to Deal with Existing Customers under Article 82 EC", *ECLR*. Issue 12, pp 683–694.

34. In short, there seems to be a more onerous duty on a firm dominant in an upstream market to maintain supply to existing customers than to start supplying new customers.[9] Cases such as *Commercial Solvents* reflect obligations on the upstream firm not to use market power in supplying current customers to threaten competition taking place on a downstream market. But the obligations appear less severe for a dominant firm that faces requests for supply from parties who wish to *begin* competing with it downstream; in such cases, the conditions under which refusal to supply is abusive are more restrictive.[10] To appreciate why *Genzyme* is interesting in this respect, we need to consider the reasoning that could lie behind this distinction.

35. Economists sometimes question the basis for drawing the distinction at all.[11] Any distinction between the duty on a dominant firm to deal with new customers and its duty to deal with existing customers can be expected to harm the incentives for the firm to experiment with different business models. This is because, where the distinction is upheld, the same conduct may be either abusive or non-abusive according to whether it represents a change in comparison to previous trading arrangements (e.g. depending on whether refusal to supply is to an existing customer or a party with whom there is no previous history of transactions). This could introduce rigidities that would hold back innovation in the ways that industry supply chains are managed and organised.

36. Even so, three principles might support the distinction:

    (a) First, it might seem reasonable for the law to punish dominant undertakings that engage in acts that make the world a worse place (e.g. less competitive), while refraining from punishing those that fail to make the world a better place (e.g. more competitive).

    (b) Second, the termination of supply (or purchasing) arrangements with existing trading partners may be considered worse than failure to enter into new supply (or purchasing) arrangements with third parties, because the termination may leave assets stranded that were previously engaged in the competitive process.

    (c) Third, if competition already exists on a downstream market, a reasonable starting point is that this competition is worth protecting (at least in the absence of major changes to the market). But before a new market has been opened up, there may be doubts as to whether this form of competition can be effective.

37. To our understanding, case law does not provide firm guidance as to which, if any, of these principles is relevant to the duties on dominant firms under competition law. Against this background, we now discuss why the idiosyncrasies of *Genzyme* offer an interesting application of each of these principles.

---

[9] OFT guidelines on abuse of dominance state that "The Director General takes the view that refusal to supply an existing customer by a dominant undertaking can be an abuse if no objective justification for the behaviour can be provided. … In some limited circumstances the refusal to supply a new customer might be an abuse", OFT (1999) *Assessment of Individual Agreements and Conduct*, OFT 414, paragraph 7.1.

[10] The recent judgment in *IMS Health* (*IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, Case C-418/01 [2004]) provides three necessary conditions for a dominant firm to have infringed Article 82 by not allowing a third party access to a product protected by copyright.

[11] E.g. see RBB Economics (2003) "The Genzyme case and the OFT's margin squeeze muddle", *RBB Brief 10*, July.

The first principle: making the world worse

38. Competition law may be guided, perhaps implicitly, by a notion that punishment should mainly be levied on those undertakings that make things worse, e.g. by lessening or eliminating competition. Indeed, such a policy would have a correspondence (albeit superficial) with merger regulation. Merger regulation prevents concentrations that are likely to lessen or impede competition, but competition policy provides much less scope to break up firms, even if this could promote competition.

39. We are not in a position to comment on whether other case law on abuse of dominance reflects the application of this principle. Nonetheless, because the Tribunal in *Genzyme* draws comparisons between Genzyme's conduct and the conduct of a monopolist operating a margin squeeze against a downstream competitor, one of the following two possibilities must be implicit in the Tribunal's decision:

    (a) either the Tribunal does not see any reason to draw a distinction between conduct that makes the world a worse place (i.e. lessens or eliminates competition) and conduct that fails to make the world a better place (i.e. would have introduced or strengthened competition); or

    (b) the Tribunal does draw such a distinction, and places Genzyme's conduct in the category of "making the world worse".

40. If (a) lies behind the Tribunal's decision, this should have been spelt out. For instance, this would seem to contradict the implication of guidelines on competition law issued by the Office of Fair Trading.[12]

41. Alternatively (b) may apply, but the Tribunal's reasoning and analysis appears insufficient to support the view that Genzyme "made the world worse". As emphasised above, the supply to the NHS of Cerezyme with associated homecare services had never exhibited competition, so Genzyme could not have lessened competition in the supply of that service by taking homecare in-house.

42. However, as it happens, there is a way in which Genzyme's conduct could fall within the category of "making the world worse". There is a more subtle way in which Genzyme's conduct could have lessened or eliminated competition, which is not addressed in the Tribunal's decision. This relates to Genzyme's decision to terminate its existing arrangements with Healthcare at Home, and is therefore discussed next, under the second principle.

The second principle: terminating existing trading arrangements

43. The second principle suggested above posits that the termination of supply (or purchasing) arrangements with existing trading partners may be considered worse than failure to enter into new supply (or purchasing) arrangements with third parties,

[12] OFT (1999) *Assessment of Individual Agreements and Conduct*, OFT 414, paragraph 7.1.

because the termination may leave assets stranded that were previously engaged in the competitive process.

44. This principle seems relevant to *Genzyme*, because the abuse identified by the Tribunal began when Genzyme stopped purchasing homecare services from Healthcare at Home. Could this termination have harmed competition?

45. The initial activity of Healthcare at Home as a supplier to Genzyme may have involved sunk investment which could only be put to use whilst Healthcare at Home provided homecare services to patients treated with Cerezyme. For example, it might have undertaken substantial staff training (e.g. of nurses) that was specific to the treatment of Gaucher patients with Cerezyme. If so, Genzyme's termination of its contract with Healthcare at Home might be considered to have removed these assets from competitive use, insofar as it:

    (a) stopped buying homecare services from a competitive bidding market; and

    (b) did not provide Healthcare at Home with Cerezyme at a sufficiently low price to enable it to use its assets to compete with Genzyme downstream.

46. In essence, there is a possibility that Genzyme could have been a dominant *purchaser* (i.e. monopsony) in a "narrow" market defined to include only the purchase of homecare services for patients treated with Cerezyme. Genzyme's decision to terminate its purchasing of homecare services from Healthcare at Home would then be analogous, in some respects, to a monopoly's decision to stop supply to a market.

47. If this was the underlying anti-competitive act in *Genzyme*, it could explain why the Tribunal found Genzyme's subsequent failure to allow Healthcare at Home to *start* competing effectively in the downstream market to be abusive: introducing such competition could have compensated for the loss of competition in the bidding market.

48. However, the Tribunal's decision does not contain evidence or reasoning to prove whether there was any harm to competition in a bidding market for homecare services, so this hypothesis remains untested. Indeed, there are grounds to doubt the likelihood that Genzyme's decision to stop buying from Healthcare at Home did harm competition in any bidding market. The relevant bidding market in which Genzyme was a buyer could well be wider than the purchase of homecare services for patients treated with Cerezyme. This is because the assets that Healthcare at Home used in supplying homecare services to Gaucher patients might have had alternative uses (e.g. homecare services for other conditions). Were the market to include the purchase of other homecare services, Genzyme's decision to stop buying from Healthcare at Home would simply have reduced the quantity of services being bought on a broad market in which several buyers competed against each other; it would not have eliminated a competitive market.

49. The Tribunal's decision does not discuss the potential monopsony case. Thus, we cannot tell whether it was Genzyme's decision to terminate arrangements with Healthcare at Home, or its failure to facilitate (new) downstream competition, that was at the heart of the finding of abuse.

The third principle: whether new competition is sustainable and desirable

50. The third principle above hypothesises that if competition already exists on a downstream market a reasonable starting point is that this competition is worth protecting, but that before a new market has been opened up to competition there may be doubts as to whether this form of competition can be effective.

51. This principle might be justified in several ways. A new form of competition may be expected to prove unsustainable as supply and demand conditions inevitably push the market towards monopoly; the transaction costs of facilitating new competition might be large; and pro-competitive measures in one market may be to the detriment of competition in related markets.[13] It might, therefore, be unwise for competition law to oblige a dominant firm to meet requests for supply that would open up competition in all areas ancillary to its dominance.

52. *Genzyme* provides an interesting application of this principle.

53. Leaving aside the potential (yet unaddressed) monopsony case suggested above, Genzyme was found to have abused a dominant position through conduct that failed to introduce new competition to a downstream market. However, there are grounds to distinguish *Genzyme* from a more straightforward case in which a dominant firm is required, by competition law, to take action to facilitate new and untested competition on a downstream market.

54. Although the downstream market had not exhibited competition prior to the abuse, the previous contractual relationship between Genzyme and Healthcare at Home provides evidence that the "wholesale" supply of Cerezyme can be separated successfully from the economic activity of homecare and delivery services. This might suggest that downstream competition is feasible even if the upstream market were to remain uncompetitive.

55. It might also be argued that Healthcare at Home's perseverance and survival in the downstream market, despite the lack of profit margin during Genzyme's abusive conduct, is relevant because it indicates that sustainable downstream competition would be desirable from the perspective of buyers (e.g. NHS consultants). But if this perseverance did influence the Tribunal's finding of abuse, it would surely constitute a strange precedent.

Conclusion

56. We have seen that *Genzyme* is something of a special case that sits uneasily amongst competition rules that seem to distinguish between supply to existing customers and supply to new customers. Because of this, the case provided an opportunity to clarify whether — and if so why — the law on abuse of dominance recognises a distinction between the obligation on a dominant firm not to harm competition that already exists, and the obligation to facilitate new competition where this could be introduced.

[13] E.g. a change to regulations that shortens patent length can be expected to enhance competition in current pharmaceuticals markets (as inter-molecule competition is increased) but to lessen competition in future pharmaceuticals markets, as incentives are reduced for the development and introduction of new drugs that are better focused on specific patient needs.

57. Unfortunately, even though three years had elapsed between Healthcare at Home's initial complaint to the Director General of Fair Trading and the publication of the Tribunal's decision, this opportunity was not taken. The judgment in *Genzyme* does not call attention to the difference between the downstream market that had never shown competition prior to the abuse, and the bidding market which had. Because of this, interesting and important questions relating to the boundaries of competition law, in the context of a dominant firm's duty to deal, were not addressed.

58. In particular, if the real abuse in *Genzyme* related to the removal of a competitive bidding market, rather than a failure to open up a downstream market to new competition, this should have been explained. Conversely, if there really is no distinction to be drawn between conduct that eliminates competition on a downstream market, and conduct which fails to introduce new competition on a downstream market, this too should have come out clearly from the decision.

59. Had the Office of Fair Trading and the Competition Appeal Tribunal been more precise when linking the effects of Genzyme's conduct to a finding of abuse of dominance, this would have eased competition law compliance for firms operating in apparently similar circumstances. But because of the mismatch between the explanation of abuse set out in the competition authorities' decisions, and the likely competitive effects in *Genzyme*, it is hard to see what useful guidance the case offers on compliance strategies. This is to the detriment of all (potentially) dominant firms that face requests from third parties for access to key inputs, for lower wholesale prices, as well as to those that wish to reorganise their supply chains.

60. An explicit analysis of how Genzyme's conduct is likely to have affected the nature of competition, focusing on the relevant supply chains, pushes this omission to the foreground. Once a closer look is taken at the competitive effects in *Genzyme*, one cannot help feeling that challenging yet important questions have been ducked.