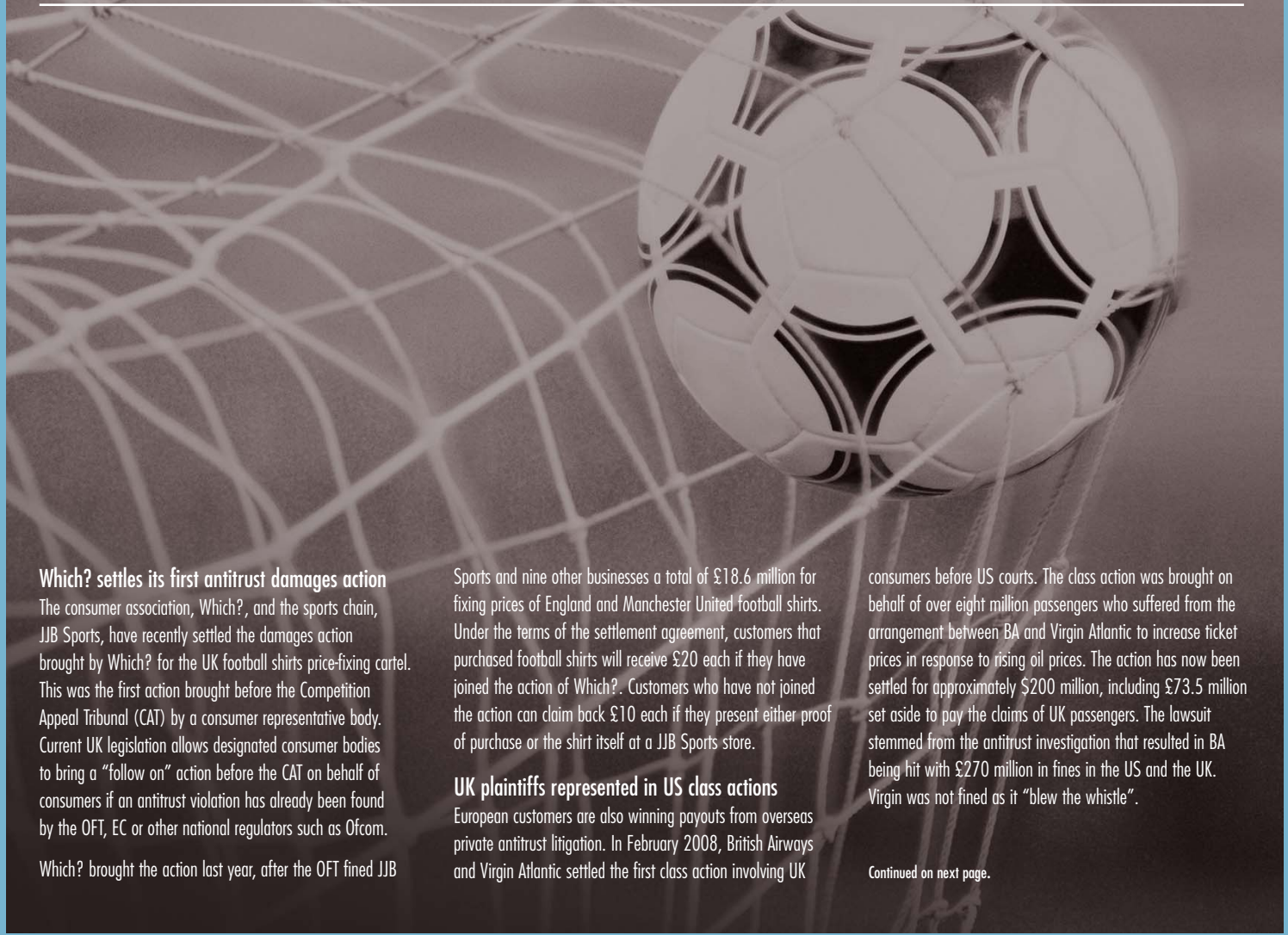
THE EUROPEAN ANTITRUST UPDATE

Key developments in competition law - Spring 2008

INSIDE: EC IN BRIEF - PHARMACEUTICAL INDUSTRY UNDER SCRUTINY - NATIONAL ROUND UP - PROTECTING YOUR DOCUMENTS - BSKYB ORDERED TO REDUCE STAKE IN ITV

MOVING THE GOALPOSTS

Businesses in Europe are facing more competition lawsuits than they may have bargained for. Two class action lawsuits have resulted in payouts for UK consumers which commentators are calling the tip of the iceberg of antitrust litigation in Europe. They come as both the UK and EU authorities are encouraging new and easier ways to litigate on competition law grounds. The UK's Office of Fair Trading (OFT) released a paper encouraging more private lawsuits at the end of 2007 and the European Commission (EC) white paper on antitrust damages actions is expected soon.



Which? settles its first antitrust damages action

The consumer association, Which?, and the sports chain, JJB Sports, have recently settled the damages action brought by Which? for the UK football shirts price-fixing cartel. This was the first action brought before the Competition Appeal Tribunal (CAT) by a consumer representative body. Current UK legislation allows designated consumer bodies to bring a "follow on" action before the CAT on behalf of consumers if an antitrust violation has already been found by the OFT, EC or other national regulators such as Ofcom.

Which? brought the action last year, after the OFT fined JJB Sports and nine other businesses a total of £18.6 million for fixing prices of England and Manchester United football shirts. Under the terms of the settlement agreement, customers that purchased football shirts will receive £20 each if they have joined the action of Which?. Customers who have not joined the action can claim back £10 each if they present either proof of purchase or the shirt itself at a JJB Sports store.

UK plaintiffs represented in US class actions

European customers are also winning payouts from overseas private antitrust litigation. In February 2008, British Airways and Virgin Atlantic settled the first class action involving UK consumers before US courts. The class action was brought on behalf of over eight million passengers who suffered from the arrangement between BA and Virgin Atlantic to increase ticket prices in response to rising oil prices. The action has now been settled for approximately $200 million, including £73.5 million set aside to pay the claims of UK passengers. The lawsuit stemmed from the antitrust investigation that resulted in BA being hit with £270 million in fines in the US and the UK. Virgin was not fined as it "blew the whistle".

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Moving the Goalposts - more lawsuits on the horizon

The OFT's November 2007 white paper suggested that the existing framework for representative bodies to bring "follow on" actions was not sufficient. It recommended that "stand-alone" actions, where there has not already been a finding of infringement, also be allowed. Representative bodies would be allowed to act on behalf of both customers and businesses.

The OFT also recommends that the current "opt in" system for bringing representative actions be fundamentally changed. The "opt in" system means that individuals must actively opt to join the lawsuit. For example, the UK consumer body, Which?, had to publish advertisements in newspapers to solicit individuals to join their action as claimants.

The OFT recommends that, rather than an "opt in system" a judge decide whether an action can be brought on behalf of consumers or businesses at large. This would be comparable to US class actions.

The OFT also said that conditional fee arrangements should be considered that would allow for more than 100% of lawyers' fees to be ordered and a "merits-based" litigation fund to help claimants bring lawsuits. However, unlike in the US, there would be no jury trials and no treble damages.

There would be another big change in the way damages are assessed. If compensatory damages were regarded as too complex to calculate, restitutionary damages could be awarded based on amounts gained by the wrongdoers.

This would overturn the UK High Court's 2007 decision in *Devenish Nutrition v Sanofi-Aventis* that restitutionary and punitive damages were not available in competition cases.

The EC is also preparing a white paper on private litigation that will include legislative proposals on class actions and calculation of damages. The EC's proposal may have a profound impact on regulation in EU member states. EU Competition Commissioner, Neelie Kroes, has indicated that she is in favour of double damages for hard core cartels.

So while regulators insist they aim to avoid the excesses of a "litigation culture", change is certain with more lawsuits looming on the horizon.



EC IN BRIEF

All clear for Google/DoubleClick

Nearly a year after Google proposed buying privately-held DoubleClick for $3.1 billion, the EC has cleared the deal with no remedies after an in-depth review. The US Federal Trade Commission gave its sign-off in December. Critics argued that the deal would give Google an overwhelming position in online advertising. However, the EC said that Google and DoubleClick were not competitors at the moment. DoubleClick sells tools allowing internet publishers and advertisers to monitor online advertisements. The EC said that even if DoubleClick could become an effective competitor, it is likely that other competitors would continue to exert sufficient constraint and pointed to "credible alternatives", in particular Microsoft, Yahoo and AOL.

Acquisition of Reuters by Thomson gets go ahead

The EC has cleared the acquisition of UK-based Reuters by the Canadian group, Thomson Corporation. Both companies are leading financial information providers and the transaction creates a major competitor to Bloomberg. The EC made its clearance conditional on the divestment by the parties of four research databases (aftermarket broker research, earning estimates, company-specific data, and time series of economic data). While both parties are also active in the collection, aggregation and dissemination of real-time financial data, the EC did not impose any remedies with respect to these activities. A feature of the case was the co-operation of antitrust agencies across jurisdictions. The US Department of Justice and the Canadian Competition Bureau cleared the transaction on the same day as the EC, conditioned on similar remedies.

Apple aligns prices for iTunes downloads

The EC has closed its investigation into Apple's pricing practices after Apple promised to align the prices for downloading music from its iTunes online store across Europe. Which?, the UK consumer association, had complained that UK customers downloading music from the iTunes website were charged higher prices than continental customers. The EC found that iTunes checked consumers' country of residence using their credit card details and charged higher prices to UK consumers. Because Apple agreed to align its prices, the EC will neither issue a formal decision nor impose a penalty.

Record fine for Microsoft...and new investigations

The EC fined Microsoft €899 million ($1.34 billion) for failure to comply with its 2004 decision that ordered Microsoft to disclose interface documentation required to make rival work group servers fully interoperable with Windows PCs and servers. The EC concluded that until October 2007 the information disclosed by Microsoft was insufficient and the royalties charged by Microsoft for access to this information were unreasonable. This enormous fine is the highest ever imposed by the EC. Since 2004, the EC has fined Microsoft a total of €1.67 billion ($2.5 billion).

The EC has also opened two new investigations into alleged abuses of dominant position by Microsoft. The investigations relate to two allegations: tying of Microsoft's Internet Explorer browser to the Windows operating system, and failure to disclose interoperability information across a broad range of software products. Both investigations were triggered by complaints by Microsoft's rivals. After the EC launched its new investigations, Microsoft announced "a set of broad-reaching changes to its technology and business practices" aimed at increasing openness and interoperability of its products. In particular, Microsoft promised to publish on its website documentation for application programming interface and communications protocols. The EC responded by saying that Microsoft's announcement did not address the tying allegations. The EC's new investigations coincide with Microsoft's offer for Yahoo!, which is also likely to be closely scrutinised by the EC.

MasterCard's interchange fee found illegal

The EC has ordered MasterCard to phase out its cross-border multilateral interchange fee within six months. The interchange fee is charged by the consumer's bank to the retailer's bank whenever a consumer pays a retailer using a credit or a debit card. The interchange fee is then usually passed on by the retailer's bank to the retailer. The EC considered that the collective agreement on interchange fees entered into between the banks that adhere to the MasterCard scheme is unlawful. MasterCard Europe has announced that it will appeal the EC's decision. The EC emphasised that its decision should also provide guidance to MasterCard's rival Visa. The OFT and certain other national authorities are also investigating the interchange fees set by MasterCard and Visa.

Heavy penalties for price-fixing cartels

The EC continues aggressively to pursue price-fixing and market-sharing cartels. In December 2007, it imposed a fine of €487 million on four producers of flat glass and a fine of €243 million on five manufacturers of synthetic rubber. Cartel fines imposed by the EC in 2007 amounted to an unprecedented total of €3.3 billion.

E.ON fined for interfering with antitrust inspection

The EC fined German energy group, E.ON, €38 million for the breach of a seal during an antitrust inspection. The seal was affixed by the EC's officials to make sure that no documents were removed by the company at night. When the inspection team returned, it discovered that one of the seals had been tampered with. E.ON denied wrongdoing and argued that the seal could have been accidentally damaged by humidity or cleaning products. However, the EC dismissed these arguments after both the manufacturer of the seal and an independent expert confirmed that the seal could not have malfunctioned. This is the first time the EC has imposed a fine for the breach of a seal in an antitrust investigation.

The EC investigates Alcan's tying practices

The EC has issued a statement of objections to Rio Tinto Alcan with respect to Alcan's contracts for the sale of its aluminium smelting technology. Alcan's contracts provide that purchasers must also buy its handling equipment for aluminium smelters. The EC found that Alcan dominated the market for aluminium smelting technology and that the tying provision in question could amount to an abuse of dominance. Alcan will now reply to the statement of objections and may request a hearing, after which the EC will issue its decision.

PHARMACEUTICAL INDUSTRY UNDER SCRUTINY

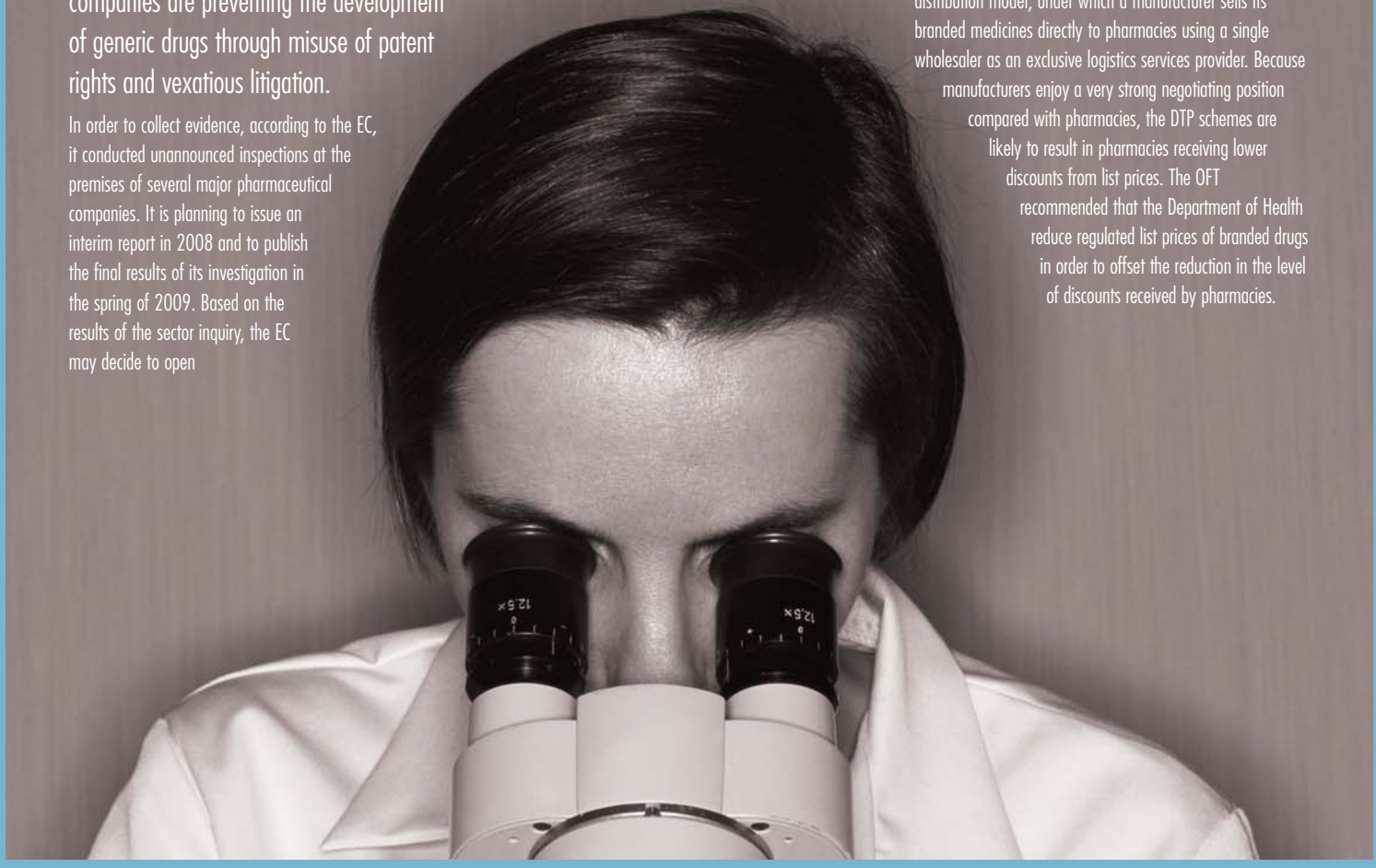
The EC has launched a sector inquiry into competition in the pharmaceutical sector. The regulator aims to investigate why the number of new drugs brought to the market has decreased in recent years. It also seeks to determine whether pharmaceutical companies are preventing the development of generic drugs through misuse of patent rights and vexatious litigation.

In order to collect evidence, according to the EC, it conducted unannounced inspections at the premises of several major pharmaceutical companies. It is planning to issue an interim report in 2008 and to publish the final results of its investigation in the spring of 2009. Based on the results of the sector inquiry, the EC may decide to open individual enforcement actions against certain pharmaceutical companies, although it remains to be seen if the EC can make out its case.

The EC has previously investigated allegations that pharmaceutical companies were abusing patent protection. In 2005, it fined AstraZeneca €60 million for obstructing the development of generic alternatives to its ulcer drug Losec. AstraZenecca has appealed the EC's decision.

More recently, the EC opened proceedings against Boehringer in relation to its alleged misuse of patent rights in the area of pulmonary disease drugs; this investigation is ongoing.

The UK's authorities are also taking a keen interest in the functioning of the pharmaceutical industry. The OFT has recently published a market study into the distribution of medicines. This study was prompted by complaints about the introduction of the so-called "direct to pharmacy" (DTP) distribution model, under which a manufacturer sells its branded medicines directly to pharmacies using a single wholesaler as an exclusive logistics services provider. Because manufacturers enjoy a very strong negotiating position compared with pharmacies, the DTP schemes are likely to result in pharmacies receiving lower discounts from list prices. The OFT recommended that the Department of Health reduce regulated list prices of branded drugs in order to offset the reduction in the level of discounts received by pharmacies.



NATIONAL ROUND UP

France: Eurostar not guilty of predatory behaviour

The French Competition Council has rejected a complaint filed by British Airways in 2004 against train operator Eurostar. BA claimed that Eurostar tried to squeeze it out of the Paris-London route by selling tickets below cost, and by saturating capacity. The Competition Council, however, found that Eurostar had not increased its capacity during the relevant time period. Moreover, it has said that Eurostar's ticket prices always covered its variable costs and, in the long run, Eurostar was committed to covering its fixed costs.

Germany: the FCO imposes high fines

The Federal Cartel Office fined RTL and Pro7Sat.1, the largest private television broadcasters in Germany, €96 million and €120 million, respectively, for offering substantial loyalty and volume discounts to advertising agencies. The FCO found that RTL and Pro7Sat.1, which together account for 80% of the television advertising market in Germany, offered these discounts in order to drive smaller competitors out of the market.

The FCO also fined seven German liquefied gas suppliers a total of €208 million for participating in a customer-allocation cartel. The investigation is ongoing with respect to four other suppliers.

Germany: de minimis exemption clarified

Under German law, a merger control filing is not required if the parties are active in a market of less than €15 million. The Federal Supreme Court has now confirmed that the market to be taken into account should be limited to Germany even if the parties compete on a pan-European level. This interpretation (contested by the Federal Cartel Office) may enable companies active in small markets to avoid merger control filings in Germany.

Poland: telecom operator in largest ever antitrust fine

The Polish Office for Competition and Consumers Protection fined Telekomunikacja Polska (TP), Poland's largest telecom operator, PLN 75 million (approximately €21 million) for abusing its dominant position in the internet services market. The Office found that TP had introduced router filters in order to disrupt internet traffic of domestic operators that used transmission services of foreign operators instead of TP's transmission services. This is the largest antitrust fine ever imposed in Poland.

UK: National Grid fined £41.6 million - highest ever fine in the UK

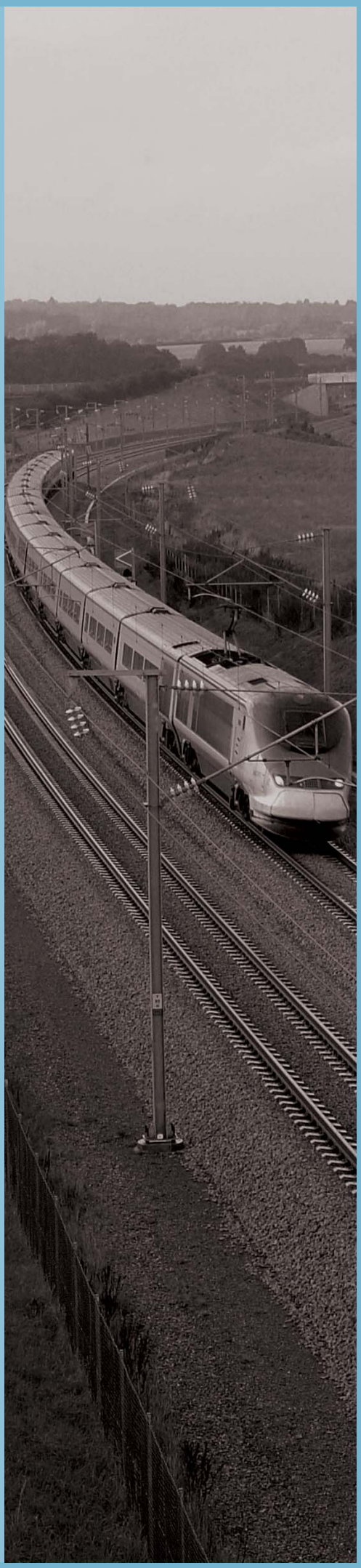
The Office of Gas and Electricity Markets (Ofgem) announced it has fined National Grid £41.6 million for abusing its dominant position in the domestic gas meter market. Ofgem found that when the metering market was opened to competition National Grid entered into long-term contracts with five of the six major energy suppliers to supply and maintain gas meters. These contracts included severe financial penalties that prevented gas energy suppliers from replacing National Grid's meters with meters from rival operators. This is the first fine imposed by Ofgem and the highest fine ever imposed in the UK for abuse of dominance. National Grid has announced that it will appeal Ofgem's decision before the Competition Appeal Tribunal.

UK: alleged price-fixing in the dairy industry

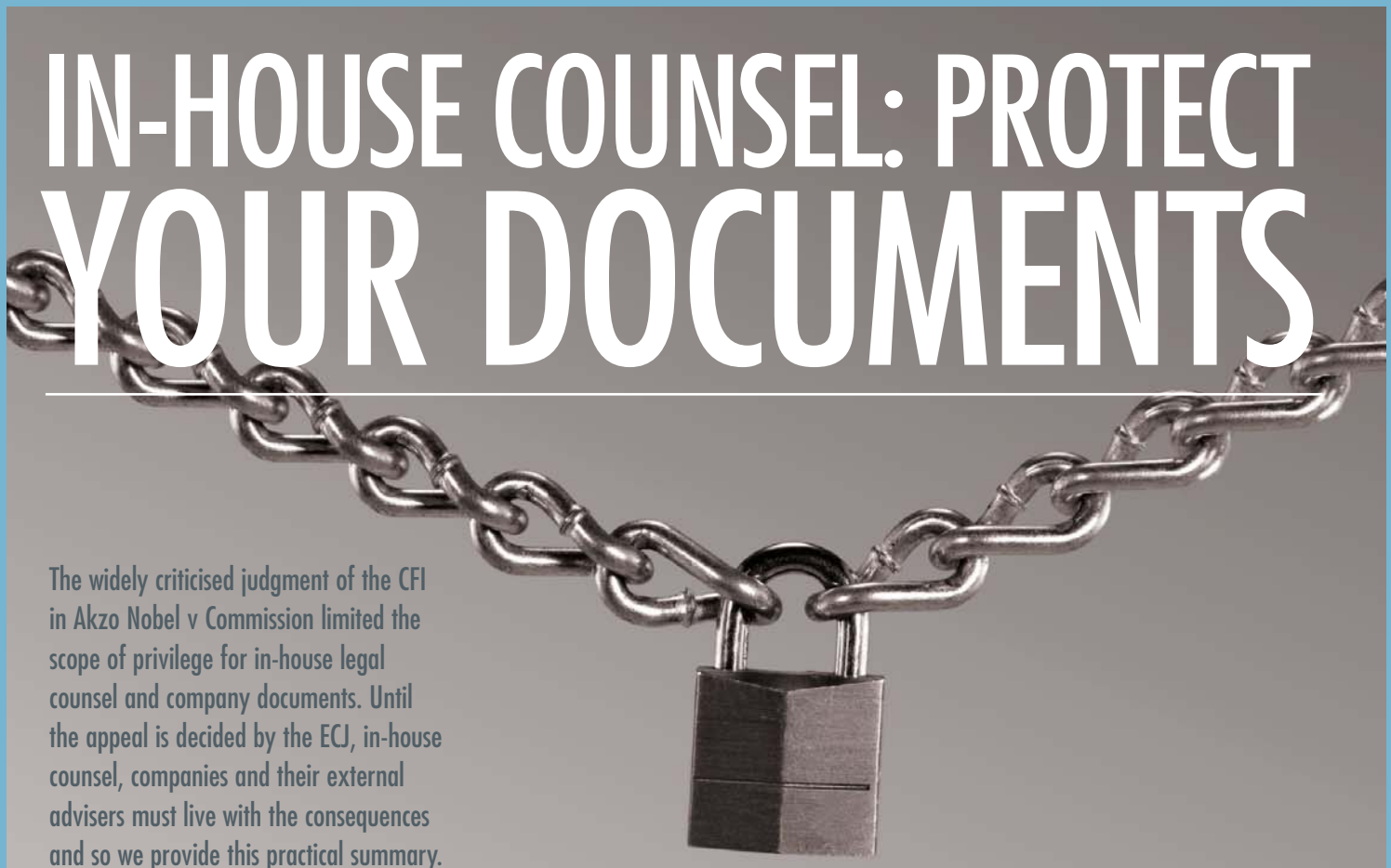
The OFT accepted early resolution agreements with three UK supermarket chains (Asda, Safeway and Sainsbury's) and five dairy processors in relation to the alleged collusion on the retail prices of dairy products. The companies have agreed to pay penalties which amount to a total of over £120 million. However, two other supermarket chains, Morrison and Tesco, refused to enter into resolution agreements. Moreover, in a highly unusual step, Morrison sued the OFT for libel over a press release published by the OFT in connection with the dairy cartel investigation. According to press reports, Morrison is also seeking judicial review of the OFT's handling of the case.

UK: three businessmen charged in cartel

The OFT charged three UK businessmen with participating in an alleged cartel to allocate markets and customers, restrict supplies, fix prices and rig bids for the supply of marine hoses (used to transfer oil between tankers and storage facilities). The defendants, together with five nationals from other countries, were arrested by the US authorities in Houston, Texas. They pleaded guilty to the charges brought by the US Department of Justice and agreed to serve prison sentences ranging from 20 to 30 months and to pay fines of between $75,000 and $100,000. The defendants were then escorted to the UK to allow them to cooperate with the OFT's investigation. It has been reported that the defendants will serve their jail time in the UK. Individuals convicted of the cartel offence under the UK's Enterprise Act may be sentenced to up to five years' imprisonment and/or an unlimited fine.



IN-HOUSE COUNSEL: PROTECT YOUR DOCUMENTS



The widely criticised judgment of the CFI in Akzo Nobel v Commission limited the scope of privilege for in-house legal counsel and company documents. Until the appeal is decided by the ECJ, in-house counsel, companies and their external advisers must live with the consequences and so we provide this practical summary. Bear in mind, though, that you should always seek specific advice pertaining to your own circumstances.

According to the Akzo ruling, privilege is narrowly confined to communications made for purposes of exercising "rights of defence" and that emanate from independent lawyers. Companies seeking protection have the burden to prove that the documents have the exclusive aim of seeking legal advice from outside counsel. This means that in practice only four categories of documents are covered by legal privilege under EU law:

1. Written communications exchanged between the company and its external lawyers, who must be admitted or registered in an EEA jurisdiction ("EEA lawyers"), after the inititation of an antitrust investigation.
2. Earlier communications exchanged between the company and its external lawyers in the EEA, if these communications have a relationship to the subject-matter of the investigation.
3. Internal notes drawn up exclusively for the purpose of seeking legal advice from EEA external counsel in exercise of the company's rights of defence.
4. Internal notes circulated within the company which reports the text or the content of communications with external EEA lawyers containing legal advice.

Internal documents prepared by an in-house lawyer are not privileged under the EU Court decisions unless they fall within one of these four categories. For instance, in Akzo, the European Commission (EC) officials had taken memos and notes from the General Manager regarding competition law compliance, as well as emails exchanged between the General Manager and Akzo's in-house coordinator of competition law. Akzo ultimately lost its claim to privilege over all these documents.

In-house counsel and company executives should therefore take, at least, the following precautions where documents may be discoverable by the EC in a competition investigation. Note that EU national laws vary on protection of privilege. However, the Azko rules will apply if the European Commission, is investigating, even if carried out in an EU Member State, like the UK, which has broader protection of privilege.

Do's

- Mark all communications with EEA lawyers "Privileged and Confidential/Outside Lawyer Client communication". (The EEA means the EU member states plus Norway, Iceland and Liechtenstein.)
- Mention prominently on any notes prepared for the purpose of seeking external legal advice in relation to an investigation that they are prepared solely for seeking legal advice.
- Have any sensitive communication from a non-EEA lawyer, at least co-signed or co-authored by an external lawyer admitted or registered in the EEA.
- Ensure that sensitive legal communications emanate from outside counsel only.
- Object to seizure by EC officials of documents considered privileged. You do have to indicate the basis for the claim of privilege, e.g., by pointing to the author, for whom it was intended, the purpose or the context in which it was found. The EC officials are not entitled to a cursory look if this would reveal the contents. Do insist that disputed documents be placed in a sealed envelope to have their status determined in Court.

Don'ts

- Do not prepare written advice and other internal notes relating to European competition law matters unless your notes (i) are drawn up exclusively to seek legal advice from external counsel in the EEA, or (ii) report the text or the content of communications with external counsel.
- Do not amend any written legal advice received from external lawyers (e.g. by adding further comment which may destroy the privilege of that document).
- Do not assume that if sensitive information relates to an existing antitrust compliance program or other commercial matters that it will be necessarily protected.
- Do not circulate privileged correspondence widely within the company, share it only with those who truly need it.



BSKYB ORDERED TO REDUCE ITS STAKE IN ITV

Both Virgin Media and BSkyB have appealed the decision by John Hutton, Secretary of State for Business, Enterprise and Regulatory Reform (SoS), regarding BSkyB's stake in ITV. BSkyB took a 17.9% stake in the rival broadcaster in November 2006. The SoS, who followed the conclusions of the Competition Commission (CC), ordered BSkyB to divest its stake in ITV to a level below 7.5% but also found that there had been no adverse effect on media "plurality". The SoS rejected the alternative remedies suggested by BSkyB, such as placing all BSkyB's shares in ITV in an independent voting trust. The Secretary of State also ordered BSkyB not to seek representation on ITV's board.

The CC found that BSkyB's minority stake was likely to result in a substantial lessening of competition arising from loss of rivalry in the UK's all-TV market. For instance, BSkyB could use its shareholder's vote to limit ITV's ability to raise funds, e.g., to develop new content or buy sports rights or invest in HDTV. However, the CC also found that media plurality would not have been adversely affected by BSkyB's influence. The CC only looked at news programming as an indicator of plurality and accepted the testimony of Sky and ITV that they could not influence news editorial decisions. Virgin Media contests that this is a sufficient measure of media plurality.

BSkyB argues any divestment is unnecessary and Virgin Media has argued that even 7.5% is too high. Both parties have lodged their appeals with the Competition Appeal Tribunal.

The pay TV market in which BSkyB is active is also subject to an investigation by the UK's Office of Communications (Ofcom). While Ofcom has not yet reached a conclusion, it has identified several areas of concern, such as whether vertically-integrated firms have the incentive to foreclose their competitors' access to premium content, like sports and films. Ofcom's investigation was triggered by a complaint from BT, Setanta, Top Up TV and Virgin Media.

Fried Frank has acted as a competition law advisor to Virgin Media in relation to these matters.

Contacts

LONDON
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

PARIS
65-67, avenue des Champs Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax: +33.140.62.22.29

FRANKFURT
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

NEW YORK
One New York Plaza
New York, NY 10004
Tel: +1.212.859.8000
Fax: +1.212.859.4000

WASHINGTON, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: +1.202.639.7000
Fax: +1.202.639.7003

HONG KONG
in association with Huen Wong & Co.
9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

SHANGHAI
No. 888 Wanhangdu Road
7th Floor, Unit D
Shanghai 200042
(until Spring 2008, when we will be located in Park Place, Nanjing Road West)
Tel: +86.21.2321.0188
Fax: +86.21.6326.6899

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