



zipper makers fined more than €300 million

After a six year investigation, the EU Commission has fined several manufacturers of fasteners and attaching machines in excess of €300 million in total.

The investigation unearthed four separate cartels:

- from 1991 to 2001, where the manufacturer agreed annually on price increases for particular products;
- from 1999 to 2003, in which two leading makers, Prym and YKK, fixed prices on a product-by-product and country-by-country basis, and allocated customers;
- from 1998 to 1999, where YKK, Prym and the Coats Group met to exchange price information and fix prices for each zip fasteners; and
- from 1977 to 1998, in which Prym and Coats agreed to share the whole haberdashery market between themselves.

exacerbating fact

Evidence was discovered to show that high ranking management (MD's, sales' directors and Board members) participated in regular meetings and discussions. They knew that what they were doing was illegal.

holding companies liable

In a restatement of its normal practice, the Commission elaborates in its decision that it holds all relevant legal entities responsible for the illegal behaviour. Where a parent company exercises decisive influence over the commercial behaviour of its subsidiaries, legal responsibility for the infringement and the fine can be attributed to both.

The biggest fines were:

- YKK €150,000,000
- Coats €122,000,000
- Prym €40,000,000

Prym received total immunity from fines in respect of its participation in the 4th cartel listed above, because it was the first source of information on this cartel. The fines imposed on Prym for involvement in other cartels were also reduced because of its cooperation, as was the case for YKK and Coats.

claims for compensation

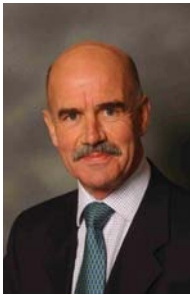
The Commission has drawn attention in its press release announcing this decision, to the fact that anyone affected by the anti-competitive behaviour may seek damages in a national court. The published decision may be submitted as evidence of the facts alleged.





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supermarket cartel fixes prices of dairy goods

In September this year, the Office of Fair Trading announced that it had found evidence of collusion between certain large supermarkets including Asda, Morrisons, Safeway, Sainsbury's and Tesco, and dairy processors as to the retail prices of dairy products. The OFT found that this collusion had led to consumers overpaying for butter, milk and cheese by an estimated £270 million.

The exchange of price-sensitive information and the fixing of prices for products with competitors is in direct breach of the prohibition on anti-competitive agreements. The penalties for breach of this legal obligation are significant; they include a fine of up to 10% of annual worldwide turnover of each undertaking involved, up to five years imprisonment and an unlimited fine for individuals who are dishonestly involved in setting up the agreements, disqualification of the directors involved, and the possibility of damages claims by third parties.

fines

Several of the companies implicated by the OFT admitted involvement in certain anti-competitive practices. These companies, which include Sainsbury's, Asda and Safeway, have undertaken to co-operate fully with the OFT in the on-going investigation. The OFT has concluded early resolution agreements with these companies according to which the companies will pay penalties amounting to a maximum of £116 million.

One of the dairy processors involved, Arla, blew the whistle on the cartel, and will receive full immunity from any fine on the condition that it continues to co-operate with the investigation. The OFT takes this flexible approach to fines in order to encourage companies to come forward with information about anti-competitive agreements and cartels, and to reflect the fact that co-operation dramatically reduces the burden of investigations.

milk of human kindness

The anti-competitive agreements investigated by the OFT relate to the exchange of price sensitive information during 2002 and 2003, the period shortly after the foot and mouth crisis and a time when the farmers were seriously effected by low milk prices. Some of the companies implicated in the investigation claimed that they were raising the prices to try to support the dairy farmers during this difficult period.

Representatives of the dairy industry, however, question whether the companies were acting out of genuine concern for dairy farmers. Sean Rickard, a consultant to the dairy industry and former chief economist at the National Farmers' Union is quoted by the BBC as saying, "If one looks back at the data, it does appear that there does seem to have been an increase in retail prices, even an increase in processors' margins, but the dear old dairy farmers really saw no tangible benefit".

customer reaction

Customers have responded strongly to this story in the press, questioning how the fines of £116 million can be a deterrent when customers were overcharged by £270 million in total. The OFT is continuing to pursue its investigations against those companies with whom the OFT has not agreed early resolution settlements and it may be that the aggregate fines levied throughout the entire investigation come close to or surpass the £270 million marker.

As to whether consumers can claim back the excess they paid for their dairy goods, there is an opportunity to do so under the provisions of the Competition Act 1998, the same Act which sets out the prohibition on anti-competitive agreements. The claim could be brought by a representative body but only when the OFT's final decision in the case has been published and only after all avenues of appeal against the decision have been exhausted. The replica football shirts case is the precedent, although it is probably far easier to prove loss in relation to the purchase of an excessively priced shirt than in relation to the purchase of excessively priced pints of milk and blocks of cheese in 2002 and 2003.

deterrent

The OFT has stated that it is committed to using its extensive powers to punish the illegal behaviour of the companies involved in the anti-competitive activities it is investigating. Those companies who have not come to a resolution agreement with the OFT have the opportunity to defend their behaviour and may yet be cleared of any involvement in breaches of competition law. If not, however, the fines levied are likely to be considerable.

the Court of First Instance's decision in Akzo Nobel

The Court of First Instance recently caused a stir among in-house lawyers when it dismissed an appeal against the judgment of the European Commission following an investigation into Akzo.

The Commission in exercising its powers of investigation carried out a "dawn raid" of Akzo's premises to search for potential evidence of anti-competitive behaviour. During the investigation Akzo claimed that certain documents were protected by the law of privilege. These documents were communications between Akzo and its lawyers and prepared for the purposes of obtaining legal advice. Akzo therefore claimed that they could not be examined by the Commission. However, the head of the Commission's investigating team decided to take a cursory look at the documents to decide whether they were indeed privileged. The documents were then placed into a sealed envelope until a final decision could be reached whether they were indeed protected by legal professional privilege (LPP).

On the facts of this case, the significance of the CFI's decision for competition law purposes is three-fold:

- First, the CFI has confirmed that LPP only applies where the lawyer is independent i.e. it does not apply to in-house lawyers. Disappointing as this decision is for in-house lawyers, they will have to continue to find alternative ways of seeking protection for certain documents.
- Secondly, the CFI gave procedural security to parties being investigated by deciding that the Commission had not followed proper procedure during the dawn raid. It confirmed that the Commission could not force a party to allow it to look at the documents to confirm whether they are privileged. It must ensure that, where it has decided to reject a claim for privilege, it gives that investigating party time to appeal that decision.
- Thirdly, the Akzo decision also extends the categories of document that are protected during an investigation. Now included in this category are documents that are prepared exclusively for the purposes of seeking legal advice from an independent lawyer. It is worth noting that documents need only be *prepared*, they do not in fact have to be sent to the independent lawyer.

so what does this all mean for businesses?

The CFI's decision provides certainty and security to companies about their rights during an investigation by the Commission, and the procedure that the Commission must follow in order to protect those rights, particularly during a dawn raid.

It also reinforces the need for companies to have in place a robust competition policy and internal procedures, and to train staff to monitor and ensure compliance with that policy.

Companies and their legal advisers (both in-house and outside law firms) will need to think carefully about how documents are generated internally so that they can be protected by LPP.

If you require further information on these, or any other matters, please contact one of the team.